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MURAD HUSSAIN

Defending the Faithful: Speaking the Language of Group Harm in Free Exercise Challenges to Counterterrorism Profiling

ABSTRACT. Counterterrorism officials increasingly seek to scrutinize conduct and behavior that they believe, however uncertainly, to be probative of terrorist activity. When such conduct-based profiling specifically targets activity that is also expressive of Muslim identity, it may inflict pervasive dignitary and stigmatic harms upon the American Muslim community. Those seeking redress from such policies through litigation would find that existing constitutional doctrine does not readily let judges account for group harms when balancing the interests at stake. This Note, however, argues that Muslim plaintiffs can use the Free Exercise Clause doctrine of "hybrid situations," announced in *Employment Division v. Smith*, to plead that certain profiles' burdens upon their religiously motivated exercise of secular constitutional rights threaten to subordinate their religious community as a whole.

AUTHOR. Yale Law School, J.D. 2007; Harvard University, A.B. 1999. I would like to thank my wife, Laura Moranchek Hussain, for her daily encouragement and advice throughout the writing of this work; Professors Michael Wishnie, Kenji Yoshino, and Reva Siegel for their insights and guidance; and Benjamin Siracusa for his perceptive comments. I dedicate this piece to my grandmother, Qamar Ahmad Ali Khan, who continues to be an example to me of how faith can inspire a life of love and good works.

NOTE CONTENTS

[W]hat I feel like saying is, "Sir, prove to me that you are not working with our enemies."[1]

That's the whole question of my existence right now . . . . Do we have rights? I'm a taxpayer and I'm an American, and I want to be treated like one.[2]

INTRODUCTION

To be an American is to live with a hybrid identity. We each reside at the intersection of various "cultures" – self-defining communities of shared beliefs, practices, and histories that offer their members "maps of meaning" by which to chart worthwhile lives.[3] Even when claiming membership in a dizzying array of racial, ethnic, religious, and other *social* cultures, we all also share a national *civic* culture. This civic culture is founded on core values of "individualism, egalitarianism, and tolerance of diversity," as expressed through our Constitution, laws, and mechanisms for the creation of national meaning such as political participation, public discourse, and entrepreneurship.[4] Unlike ascriptive group identities based on passive pigmentation or phenotype, "cultural" group identity can be viewed through the lens of performativity, whereby an individual can affiliate herself with a community by embracing traits and conduct that continually recommit her to membership within it.[5]

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1. *CNN Headline News: What Should Be Done with Iran? First Muslim Congressman Speaks Out* (CNN television broadcast Nov. 14, 2006) (talk show host Glenn Beck speaking to Rep. Keith Ellison, the first Muslim elected to the U.S. Congress), *available at* http://transcripts.cnn.com/TRANSCRIPTS/0611/14/gb.01.html.

2. Neil MacFarquhar, *U.S. Muslims Say Terror Fears Hamper Their Right To Travel*, N.Y. TIMES, June 1, 2006, at A1 (quoting comedian Ahmed Ahmed).

3. JORDAN B. PETERSON, MAPS OF MEANING: THE ARCHITECTURE OF BELIEF (1999) (drawing from neuropsychology, anthropology, and mysticism to argue, in part, how religious, ethnic, and other cultural systems help to regulate human emotion and experience); *see also* Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 127-28 (1997) (viewing membership in a cultural group as providing a normative "scaffold" for meaning-creation).

4. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 306 (1986); *see also* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 305-06 (1991) (discussing the concept of "private citizenship" as a balance between one's attention to "the national political stage" and an individual's attention to "her work, her family, her friends, her religion, her culture, all weaving together to form the remarkable patchwork of American community life").

5. *See* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (2d ed. 1999) (elaborating a concept of "gender performativity"); Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 871 (2002) (proposing that the "weak performative model" holds that "one's

Thus an American woman of African descent might express her "black" identity by wearing cornrows.[6] Parents from Germany might teach their children to celebrate their linguistic heritage.[7] And a citizen who calls herself Muslim might do so only because she can also say she "practices" Islam by constructing her identity through religious signifiers such as head coverings, hairstyles, and acts of congregation or association.[8]

During times of domestic tranquility, our paeans to multiculturalism acknowledge this performativity by encouraging ethnic and religious minorities to participate in civic culture as a way to embrace their "American" identity, develop common cause with the rest of the polity, and cultivate empathy for their own social heritage. Yet when our nation faces external threats, fear often obscures the common ground that people of diverse backgrounds share. Cultural minorities may find themselves under suspicion, their diversity stigmatized as disloyalty to the civic culture under siege from without. Indeed, public and private actors throughout American history have presumed the disloyalty of cultural minorities out of fear that their distinctive expressions of religious and ethnic identity masked threats to the Republic's survival. This distrust spawned the mass detentions of pacifist Quaker colonists during the Revolutionary War,[9] the nineteenth-century nativist characterization of Catholics as "human priest-controlled machines" dedicated to democracy's destruction,[10] the roundups of Eastern European immigrants

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identity will be formed in part through one's acts and social situation, rather than being entirely guaranteed by some prediscursive substrate").

6. *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981) (rejecting an airline employee's antidiscrimination challenge to a company policy barring braided hairstyles).

7. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating a statute under which a private school instructor was convicted for teaching German to a child before ninth grade).

8. *See* Frederick Mark Gedicks, Comment, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 158 ("[R]eligious groups are a locus for certain of the constitutive, foundational activities by which Americans define and determine who and what they are, both individually and communally."). *See generally* David B. Salmons, *Toward a Fuller Understanding of Religious Exercise: Recognizing the Identity-Generative and Expressive Nature of Religious Devotion*, 62 U. CHI. L. REV. 1243 (1995) (analogizing religious identity to sexual orientation along their common dimension of performative expression).

9. *See* Morgan Cloud, *Quakers, Slaves and the Founders: Profiling To Save the Union*, 73 MISS. L.J. 369 (2003).

10. John A. Scanlan, American-Arab—*Getting the Balance Wrong—Again!*, 52 ADMIN. L. REV. 347, 357 (2000) (quoting SAMUEL F.B. MORSE, IMMINENT DANGERS TO THE FREE INSTITUTIONS OF THE UNITED STATES THROUGH FOREIGN IMMIGRATION, at iv (1835), *reprinted in* THE AMERICAN IMMIGRATION COLLECTION (1969)).

during the 1919 Palmer raids,[11] the World War II-era lynching of Jehovah's Witnesses for their refusal to salute the flag,[12] and the internment of Japanese-Americans.[13]

History has repeated itself in the years following the attacks of September 11, 2001. Many Americans view Islam and Muslims as a direct threat to civic culture: one in four support the registration of every Muslim's home in a federal database, and two in five support the use of Muslim identity as an automatic trigger for increased government scrutiny such as special identification cards and preflight boarding interrogations.[14] At times, the federal government has reinforced these perceptions that Muslim group identity should be viewed as a valid proxy for terrorist association. In the weeks after the attacks, federal dragnets targeted thousands of immigrants from Muslim-majority countries,[15] detaining some for as long as five years.[16] None of those detained appears to have been prosecuted for terrorism-related

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11. *See* Harlan Grant Cohen, Note, *The (Un)Favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431 (2003).

12. *See* Vincent Blasi & Seana V. Shiffrin, *The Story of* West Virginia State Board of Education v. Barnette*: The Pledge of Allegiance and the Freedom of Thought*, *in* CONSTITUTIONAL LAW STORIES 433, 437-38, 443-45 (Michael C. Dorf ed., 2004) (cataloging the roots of and national reaction to Jehovah's Witnesses' refusal to salute); *see also infra* Section IV.B.

13. *See* Korematsu v. United States, 323 U.S. 214, 237 (1944) (Murphy, J., dissenting) (citing J.L. DE WITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, 1942, at 10-13 (1943)) (noting the internment architect's distrust of Japanese participation in "Emperor worshipping ceremonies" and enrollment in "Japanese language schools").

14. *See* William Kates, *Poll: Many Would Limit Some Rights of Muslims*, PHILA. INQUIRER, Dec. 19, 2004, at A32; Lydia Saad, *Anti-Muslim Feelings Fairly Commonplace*, GALLUP POLL, Aug. 10, 2006, *available at* http://media.gallup.com/WorldPoll/PDF/AntiMuslimSentiment81006.pdf.

15. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) (detailing the FBI's "PENTTBOM" detentions of 762 Muslim men in New York metropolitan area prisons); Dan Eggen, *Tapes Show Abuse of 9/11 Detainees*, WASH. POST, Dec. 19, 2003, at A1 ("Most were of Arab or South Asian descent and were held on immigration violations as part of a directive from Attorney General John D. Ashcroft while authorities attempted to determine whether they were connected to the attack or to terrorist groups.") [hereinafter Eggen, *Tapes Show Abuse of 9/11 Detainees*]; *see also* Dan Eggen, *Deportee Sweep Will Start with Mideast Focus*, WASH. POST, Feb. 8, 2002, at A1 (reporting on the Immigration and Naturalization Service "Absconder Apprehension Initiative," which first targeted six thousand immigrants from Muslim-majority countries "who have ignored court orders to leave the country" – even though "the vast majority of absconders are Latin American").

16. *E.g.*, Martha Mendoza, *1 Man Still Locked Up from 9/11 Sweeps*, WASH. POST, Oct. 14, 2006, at A19 (detailing ongoing detention, without criminal charge, of Ali Partovi).

crimes,[17] leading some to conclude that the government engaged in widespread, unjustified racial, ethnic, or religious profiling.[18]

Recognizing the flaws of profiling individuals on the basis of ascribed group labels, the head of the Office for Civil Rights and Civil Liberties at the Department of Homeland Security (DHS) has noted that counterterrorism profiles should instead be based upon "behavior, concrete action, [and] observable activities."[19] Recently, the Transportation Security Administration (TSA) announced plans to expand its use of "behavior-detection officers" at airports[20] and has already employed these officers, air marshals, and other federal agents to scrutinize metropolitan mass transit passengers for "suspicious" behavior.[21] Despite this laudable shift away from targeting passive racial, ethnic, or religious status, even "conduct-based" profiling can disproportionately burden a single minority group by targeting conduct that is significantly correlated with membership but is in no way inherently indicative of wrongdoing. For example, the TSA promulgated a new policy of potentially subjecting any airline passenger wearing a "head covering" to additional inspection if security officers "cannot reasonably determine that the head area is free of a detectable threat item."[22] The agency's own travel advisories

17. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 AND TERRORIST TRAVEL 154 (2004) (providing a table showing that out of 5932 total initial Absconder Apprehension Initiative cases, no immigration cases had resulted in terrorism-related prosecutions or deportations); Eggen, *Tapes Show Abuse of 9/11 Detainees*, *supra* note 15.

18. *E.g.*, Iqbal v. Hasty, 490 F.3d 143, 174-76 (2d Cir. 2007) (rejecting motions by FBI Director Robert Mueller and former Attorney General John Ashcroft to dismiss former detainee Javaid Iqbal's claims that the FBI "classified him 'of high interest' [and then placed him in high security detention] solely because of his race, ethnic background, and religion and not because of any evidence of involvement in terrorism").

19. MacFarquhar, *supra* note 2.

20. Del Quentin Wilber & Ellen Nakashima, *Searching Passengers' Faces for Subtle Cues to Terror*, WASH. POST, Sept. 19, 2007, at D1.

21. Sara Kehaulani Goo, *Marshals To Patrol Land, Sea Transport*, WASH. POST., Dec. 14, 2005, at A1 (reporting on "[t]eams of undercover air marshals and uniformed law enforcement officers" sent "to bus and train stations, ferries, and mass transit facilities across the country" to test a new program of "surveillance and 'counter[ing] potential criminal terrorist activity in all modes of transportation'"); TSA Checks IndyGo Bus Passengers, Indystar.com (Aug. 2, 2007) (on file with author) (reporting on a test of TSA's "Visual Intermodal Prevention Response" system at two downtown Indianapolis bus stops).

22. Press Release, Transp. Sec. Admin., Security Screenings of Head Coverings (n.d.), http://www.tsa.gov/press/happenings/head_coverings.shtm (last visited Nov. 26, 2007). Prior to the official creation of TSA's policy, one hijab-wearing woman told a reporter that she recalled "an official at airport security telling her: 'You might as well step aside. You have too many clothes on.' What was she wearing? 'Jeans, a tunic, sandals and a scarf.'" Ruth La Ferla, *We, Myself, and I*, N.Y. TIMES, Apr. 5, 2007, at G1.

recognize the potential for a disparate impact where the scrutinized conduct is not just *coincidentally* correlated with group membership, but is in fact *expressive* of membership in or solidarity with a cultural community.[23]

This Note defines "cultural profiling" as law enforcement policies that specifically target expressions of cultural identity as proxy criteria thought to be correlated with criminality, terrorist connections, or other subversive propensities. Although "profiling" often implicates Fourth Amendment concerns, this Note uses the term more broadly to describe any policy of imposing adverse state scrutiny upon a person, even absent searches or seizures, solely on the basis of a given proxy. Profiling could thus also include such decisions as whether to conduct a tax audit, permit a passenger to board an airplane, or obstruct a banking transaction. And while many have critiqued the use of profiling as a cover for affirmative animus, this Note will argue that it remains no less problematic when good faith efforts to catch the nefarious reveal the government's indifference to ensnaring the innocent.[24]

As federal and state law enforcement increasingly coordinate their homeland security efforts,[25] cultural profiling that exploits religiously motivated activity as a proxy for terrorist threats could inflict pervasive dignitary and stigmatic harms upon the American Muslim community. Yet those seeking judicial redress from such burdens may encounter significant jurisprudential obstacles. The Supreme Court's prevailing interpretation of the Fourteenth Amendment's Equal Protection Clause disfavors the state's distribution of "burdens or benefits" on the basis of certain suspect classifications.[26] A Muslim profiled by federal agents because of her perceived racial, ethnic, or religious *status* would have a cognizable claim under the equal

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23. *See* Transp. Sec. Admin., Religious and Cultural Needs, http://www.tsa.gov/travelers/airtravel/assistant/editorial_1037.shtm (last visited Nov. 26, 2007) (describing how TSA's "general security considerations for religious or cultural needs" give passengers "multiple options" if their loose-fitting clothing or head coverings are viewed as potentially concealing a "threat item").

24. *See, e.g.*, OFFICE OF THE INSPECTOR GEN., *supra* note 15, at 65 n.50 (reporting on a DOJ counterterrorism attorney whose review of PENTTBOM detainee files led him to conclude that "it was 'obvious' that the 'overwhelming majority' were simple immigration violators and had no connection to the terrorism investigation").

25. *E.g.*, Nina Bernstein, *Challenge in Connecticut over Immigrants' Arrest*, N.Y. TIMES, Sept. 26, 2007, at B1 (reporting that at least thirty-nine jurisdictions around the country have deputized or plan to deputize local law enforcement officers as federal immigration agents under a federal enforcement program); *cf.* Richard Winton, Jean-Paul Renaud & Paul Pringle, *LAPD To Build Data on Muslim Areas*, L.A. TIMES, Nov. 9, 2007, at A1 (reporting on "[a]n extensive mapping program launched by the LAPD's anti-terrorism bureau to identify Muslim enclaves across the city").

26. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2751-52 (2007).

protection component of the Fifth Amendment's Due Process Clause.[27] But if the government profiled her on the basis of her religious *conduct*, equal protection doctrine would not readily support her claim of adverse treatment—even if that conduct defined her group identity.[28]

The First Amendment would therefore seem a more plausible avenue for relief from cultural profiling, because on its face it privileges one example of cultural performativity: the free exercise of religion. After the Supreme Court applied the Free Exercise Clause to the states, it spent considerable energy protecting Jehovah's Witnesses and others from the effects of private animus and governmental apathy. This group-protective approach reached its peak in *Wisconsin v. Yoder*,[29] where the Court exempted Amish parents from a compulsory education law that eroded their ability to propagate their distinctive social culture, because it found the Amish *community* just as worthy of judicial protection as individual Amish beliefs and practices. In 1990, however, *Employment Division v. Smith* brought free exercise doctrine squarely into convergence with the "anticlassification" orientation already guiding equal protection and freedom of speech jurisprudence.[30] *Smith* held that plaintiffs cannot use the Free Exercise Clause alone to challenge incidental burdens upon their religious exercise that result from neutral laws of general applicability.[31]

Even when a judge might conclude that a given policy of cultural profiling does trigger strict scrutiny under *Smith*'s rule, religious freedom doctrine currently suggests no easy way to enunciate concerns about group-based disparate treatment or the relationship between individual expression and group identity. As a result, judges may weigh the costs and benefits of cultural profiling on a purely "transaction-by-transaction" basis.[32] Although courts may explicitly consider the economic and dignitary burdens imposed upon individual Muslim plaintiffs, they may just as likely leave unexamined the

27. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

28. *See* Hernandez v. New York, 500 U.S. 352 (1991) (plurality opinion) (holding that a prosecutor acting without invidious intent permissibly used peremptory strikes to remove Hispanic individuals from a jury pool because they understood Spanish).

29. 406 U.S. 205 (1972).

30. *See* Employment Div. v. Smith, 494 U.S. 872, 886 n.3 (1990); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003). *See generally* Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B.C. L. REV. 275 (2006).

31. 494 U.S. at 878-79.

32. Owen Fiss, *Another Equality* 3 (Issues in Legal Scholarship, The Origins and Fate of Antisubordination Theory, art. 20, 2004), http://www.bepress.com/ils/iss2/art20.

externalized costs of such profiling that must be borne by the wider Muslim community, particularly the stigmatization of its religious identity.[33]

An existing but little understood doctrine offers a way for plaintiffs to voice such a theory of group harm in certain free exercise challenges. *Smith* carved out an exception to its general rule, such that neutral and generally applicable measures that implicate *both* the Free Exercise Clause *and* a second constitutional protection could remain subject to strict scrutiny as a "hybrid situation."[34] Commentators have suggested that this concept of hybridity was offered merely to preserve the validity of *Yoder*,[35] which *Smith* characterized as a case where the substantive due process right of parental control over a child's upbringing was "reinforced" by the free exercise claim.[36] Some courts view *Smith*'s carve-out for hybrid situations as mere dicta.[37] Nonetheless, both *Smith*'s rule and its exception remain good law.[38]

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33. Although the Fourth Amendment is beyond the scope of this Note, it also offers little protection from the group harms of counterterrorism profiling. When evaluating the "reasonableness" of warrantless searches that serve "special governmental needs, beyond the normal need for law enforcement," courts balance *individual* privacy expectations against the government's interests. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); *see also, e.g.*, Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 451 (1990) (holding that a roadside sobriety checkpoint did not violate the Fourth Amendment because "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it," and because "the weight bearing on the other scale – the measure of the intrusion on motorists stopped briefly at sobriety checkpoints – is slight"). The Fourth Amendment also has limited application at the border and at airports, where transportation security concerns seem likely to result in increased scrutiny of Muslim travelers. *See* City of Indianapolis v. Edmond, 531 U.S. 32, 47-48 (2000) (asserting without discussion "the validity of . . . searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute"); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) ("[T]he Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior."). For an exploration of the interaction between the Fourth Amendment and the Equal Protection Clause in conventional racial profiling cases, see Albert W. Alschuler, *Racial Profiling and the Constitution*, 2002 U. CHI. LEGAL F. 163.

34. *Smith*, 494 U.S. at 882.

35. *E.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990).

36. *See Smith*, 494 U.S. at 881-82 (discussing previous hybrid situations and noting that associational freedom claims might "likewise be reinforced" by free exercise concerns).

37. *E.g.*, Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003).

38. *See* City of Boerne v. Flores, 521 U.S. 507, 513-14 (1997) (citing *Smith*'s discussion of *Yoder* as a hybrid situation); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (invalidating a municipal ordinance under *Smith* because it was neither neutral nor generally applicable).

This Note argues that Muslim plaintiffs can plead hybrid claims to challenge certain instances of cultural profiling that burden and stigmatize their religious community as a whole. Not all religiously motivated activity would present a hybrid situation, and hybrid claims may not necessarily—if ever—succeed in invalidating a profiling policy. But pleading them will help Muslim plaintiffs offer judges a normative account of group harm that can more robustly challenge the executive's counterterrorism calculus.[39] And even when courts do not reject cultural profiling's asserted rationality, pleading hybrid claims may force a more open and honest judicial reckoning with the potential social costs of such security measures.

Part I posits that the uncertainty inherent in predicting human behavior will likely lead to overinclusive counterterrorism policies of the kind giving rise to the case *Tabbaa v. Chertoff*,[40] which involved a prototypical act of cultural profiling. Part II provides a holistic view of the costs that cultural profiling can impose upon American Muslims and the social meaning of their religious identity. Part III explores how existing equal protection, freedom of speech, and religious freedom doctrines do not reach cultural profiling's group-subordinating effects. Part IV proposes a theory of hybrid situations, grounded in *Yoder* and the 1940s Jehovah's Witness cases, as pleas for judicial attention to the community harms that result from indirect burdens upon religiously motivated exercises of secular constitutional rights.

I. PROFILING UNDER UNCERTAINTY

Creating a cultural profile requires making a judgment about the likelihood that those who attempt to engage in illegal activity will also engage in *legal* activity that is easier to observe. Since innocent people also undertake legal activities, cultural profiles will almost inevitably be overinclusive. For example, Los Angeles police might profile young men of Korean ethnicity on the basis of nonverbal cues that they have seen adopted by members of Korean gangs, even though the targeted interpersonal behavior may actually be characteristic of Korean culture more generally.[41] Similarly, border patrolmen in west Texas might be trained to suspect that any vehicle displaying Christian decals, such as

39. *See* Samuel R. Bagenstos, *"Rational Discrimination," Accommodation and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 849-59 (2003) (arguing that combating disparate treatment may mean embracing economically nonrational moral imperatives).

40. 509 F.3d 89 (2d Cir. 2007).

41. Daniel Ahn, *Profiling Culture: An Examination of Korean American Gangbangers in Southern California*, 11 ASIAN L.J. 57, 59 (2004).

the fish symbol, is being driven by a drug smuggler who is using those images to deflect suspicion.[42] But where these religious symbols are "omnipresent" on vehicles in that area, regular use of the profile—even if it leads to a smuggler's capture—would burden many of the local faithful "who wish to proclaim their beliefs on the bumper of their car."[43]

Any attempt to defend or critique a profile's predictive validity in mathematical terms risks obscuring the truism that predicting human behavior is an inherently uncertain project. Officials can only make educated guesses about what a terrorist is likely to do. A given profiling proxy may thus fail to describe policymakers' intended objects as precisely as they would have expected. This Part will detail one example of such imprecision and then survey the decision-making processes that can influence the promulgation of cultural profiles.

A. Cultural Profiling in the Counterterrorism Context: Tabbaa v. Chertoff

In December 2004, several dozen American citizens—men and women of all ages with U.S. passports and other valid identification—were driving home to New York from Canada.[44] As they arrived at a border checkpoint outside Buffalo, Homeland Security officials from Customs and Border Protection (CBP) ordered them into a small, unheated room. The travelers had committed no crimes or customs violations, nor were they suspected of any.[45] Yet when some of them tried to call family, lawyers, and the media, DHS officials confiscated their cell phones.[46] They were held for hours, some overnight, and were searched and interrogated about their activities in Canada and whether they had any links to terrorism.[47] Threatened with indefinite detention unless they submitted to fingerprinting and photographing,[48] they all complied in order to regain their freedom.

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42. United States v. Ramon, 86 F. Supp. 2d 665, 673 (W.D. Tex. 2000) (granting motion to suppress evidence seized by roving border patrol).

43. *Id.* at 673, 677.

44. *See* First Amended Complaint ¶¶ 2, 22, Tabbaa v. Chertoff, No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189 (W.D.N.Y. Dec. 21, 2005), *aff'd*, 509 F.3d 89 (2d Cir. 2007).

45. *Tabbaa*, 2005 U.S. Dist. LEXIS 38189, at *11-12, 33.

46. *See* First Amended Complaint, *supra* note 44, ¶¶ 25, 46.

47. For example, one detainee was asked "whether anyone had asked him to harm Americans." *Id.* ¶ 74.

48. *See id.* ¶¶ 27-28, 50-51, 53, 65, 75.

These American detainees were all Muslims returning from a three-day conference at the Toronto SkyDome titled "Reviving the Islamic Spirit" (RIS).[49] The youth-focused event had been open to ticket-paying members of the public and was attended by over thirteen thousand people.[50] The conference-goers came for worship, devotional music, panel discussions, shopping bazaars, and a keynote speech—"In the Spirit of Love"—offering reflections on the second coming of Jesus Christ, delivered by an American-born imam who had previously advised President George W. Bush. Officials addressing the event included the head of Canada's national police and the Premier of Ontario, who wished the attendees his best: "I applaud the thousands of enthusiastic young people who have come together this weekend in a spirit of optimism to explore ways in which Muslim youth can make a difference in the life of their community—and make the world a better place."[51]

In 2005, five of the detainees filed a federal lawsuit against the DHS.[52] Seeking only declaratory and injunctive relief, the plaintiffs alleged, among other things, that the DHS had violated their First and Fourth Amendment rights. The litigation uncovered evidence that the DHS feared that terrorists might use any one of several contemporaneous North American Islamic conferences "as a cover to meet and exchange information, documents, money, and ideas about acts of terrorism."[53] The government's intelligence "indicated that the conference or conferences that were being held at that time of year were conferences [where there was] the possibility that there would be individuals or groups of individuals that might be attending that conference or those conferences that might be related to terrorist-related activities . . . ."[54]

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49. *See* RIS—Reviving the Islamic Spirit, http://www.revivingtheislamicspirit.com/convention/previous_riss1.asp?ris_version=ris3 (last visited Nov. 26, 2007).

50. In contrast with the DHS's view of the conference as a threat to America, at least one fundamentalist Muslim scholar saw it as an unholy threat to Islam and issued a *fatwa* that denounced "Zionists and Crusaders" and decried the event as encouraging forbidden religious innovation among youth. Colin Freeze & Aparita Bhandari, *Imam Issues Fatwa Against Conference*, GLOBE & MAIL (Toronto), Dec. 22, 2004, at A11.

51. First Amended Complaint, *supra* note 44, ¶ 17.

52. Tabbaa v. Chertoff, No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189 (W.D.N.Y. Dec. 21, 2005), *aff'd*, 509 F.3d 89 (2d Cir. 2007).

53. *Id.* at *51.

54. Deposition of Robert Jacksta at 152, ll. 2-8, *Tabbaa*, 2005 U.S. Dist. LEXIS 38189 (No. 05-CV-582S) (on file with author).

The intelligence, which named only Islamic conferences,[55] formed the basis of an "Intelligence Driven Special Operation" in which checkpoint officials around the United States and Caribbean received orders to detain anyone arriving from those events and process them pursuant to a special counterterrorism protocol.[56] Since the RIS Conference alone counted over thirteen thousand attendees, this nationwide dragnet could have led to the detentions and interrogations of untold numbers of returning American Muslims solely because someone with a terrorist connection *may* have been at one of those events.

The district court granted summary judgment for the DHS, reasoning that the government's power to seize the travelers at the border and retain data about their detentions – increasing the likelihood of future border detentions – trumped the plaintiffs' First Amendment freedoms of speech and religion.[57] The judgment was affirmed after the plaintiffs appealed to the U.S. Court of Appeals for the Second Circuit.[58] The judiciary thus implicitly endorsed the government's fundamental presumption that it was worthwhile to detain anyone returning from the RIS Conference because they might have been in contact, even unknowingly,[59] with a person connected to terrorism – assuming that such a person had even been there at all.

B. The "Rationality" of Cultural Profiling

Law enforcement officials do not often encounter intelligence that specifies the license plate of a smuggler's vehicle, the street intersection where gang members are loitering, or the flight that a terrorist will board. Instead, they must often decide what degree of certainty and risk they are willing to tolerate in light of the incomplete information available to them. In other words, they must decide how inefficient a profile they are willing to act upon.

The answer to that question will be informed by rational considerations of existing law enforcement resources and the administrative costs required to

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55. *Id.* at 174, ll. 7-12 (affirming that all conferences identified in the border agents' operational instructions "were in fact Islamic conferences").

56. *Tabbaa*, 2005 U.S. Dist. LEXIS 38189, at *8-9. Returning attendees were also detained at a border crossing outside Detroit; one area resident "said he and his friends were stopped and questioned for more than two hours after [the 2004] conference." Shabina S. Khatri & Niraj Warikoo, *No Incidents for U.S. Muslims: Return from Canada Goes Smoothly*, DETROIT FREE PRESS, Dec. 28, 2005, at 6B.

57. *See Tabbaa*, 2005 U.S. Dist. LEXIS 38189, at *48, 49-50.

58. Tabbaa v. Chertoff, 509 F.3d 89, 92 (2d Cir. 2007).

59. *See Tabbaa*, 2005 U.S. Dist. LEXIS 38189, at *48 n.13.

formulate a more precise profile. But it will also be shaped by imperfect cognitive shortcuts and individual biases about the correlation between the proxy activities and terrorist or criminal activity,[60] and about the likelihood that such highly salient and easily imagined threats exist.[61] Together, these conscious and unconscious influences can yield a "misapprehension of costs and benefits"[62] that accentuates institutional objectives while discounting the burdens imposed upon the innocent people—like the *Tabbaa* plaintiffs—whom the profile targets as "false positives."[63]

The next Part seeks to bring these burdens into sharper relief by outlining several countervailing concerns, particularly relating to the American Muslim community, that policymakers and judges alike should consider when evaluating a profile's asserted rationality. Obviously, these effects cannot be precisely quantified. But if those who create profiles have more incentives to internalize these externalities—if only out of fear that their failure to do so will be second-guessed during judicial review—they might more narrowly tailor these policies of their own accord.[64] From the purely utilitarian standpoint of preventing terrorism, using a weakly corroborative proxy may indeed be more "rational" than not using any profile at all.[65] But a failure to consider the social

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60. *See* Amos Tversky & Daniel Kahneman, *Introduction* to JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 4-5 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (discussing the "representativeness heuristic"); *see also* Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 PSYCH. REV. 293, 293 (1983) ("[T]he 'correct' probability of events is not easily defined. Because individuals who have different knowledge or who hold different beliefs must be allowed to assign different probabilities to the same event, no single value can be correct for all people."). *See generally* Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006) (arguing that antidiscrimination law should better account for the unconscious processes that inform decision making).

61. *See* Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra* note 60, at 163 (discussing the "availability heuristic" that overemphasizes the probability of easily recalled risks).

62. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 358 (1987).

63. *See* JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 46-47 (1997) ("The fatal flaw in the Bayesian's argument lies in his failure to take account of the costs of acting on his racial generalizations. Instead, he assumes that the rationality of his factual judgments is all that matters in assessing the reasonableness of his reactions.").

64. *Cf.* Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329, 337 (2003) (arguing that conservative principles counsel against the government's use of racial profiling).

65. *Cf. id.* at 338.

consequences of such profiling, regardless of the proxy's strength, runs counter to our civic culture's regard for equal rights and individual liberty[66]—values that counterterrorism officials are no less responsible for protecting.[67]

II. THE GROUP-SUBORDINATING EFFECTS OF CULTURAL PROFILING

Pervasive government scrutiny of culturally motivated conduct can externalize significant dignitary and stigmatic costs that are borne by those who are, or are perceived to be, a member of that same cultural community. First, such scrutiny can impose intragroup harms in the form of a "cultural tax."[68] Where individual identity is constructed by participation in a community of shared values, application of the state's coercive investigatory powers to members of that community can significantly deter their cultural expression. The greater the dignitary and stigmatic costs to the individuals who are profiled,[69] the more likely that fear of future scrutiny will pervasively chill other community members' willingness to engage in conduct that defines them.

Second, even where individual burdens are relatively trivial, cultural profiling that disparately targets one community can encourage third-party observers to draw inaccurate conclusions about that group's members and values. In the counterterrorism context, this stigmatization may not only ratify popular animus against Muslims but also undermine Muslims' efforts to cultivate intergroup empathy. Profiling can suggest, with illusory certainty, that those who participate in conduct expressive of Muslim identity should be presumed disloyal until proven otherwise. And even when profiles erroneously suspect the innocent, many Americans may continue to support such policies out of a belief that overinclusive profiling is better than none at all—

66. *See* Karst, *supra* note 4, at 373-74 ("When judges enforce the Constitution's protections of cultural minorities against various forms of domination, that judicial behavior not only helps to preserve the integrity of cultural groups but also reinforces the individualism and egalitarianism that are central to the American group identity.").

67. *See* 6 U.S.C. § 111(b)(1)(G) (Supp. IV 2004) (establishing that the "primary mission" of the DHS includes "ensur[ing] that the civil rights and civil liberties of persons are not diminished by efforts, activities, and programs aimed at securing the homeland").

68. *Cf.* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 158-60 (1997) (discussing the concept of "racial tax").

69. *E.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 98 (2d Cir. 2007) ("[T]here arguably was a stigma associated with being subject to the IDSO procedures.").

particularly if the burdens are placed on the members of a single group that they feel deserves the attention most.[70]

A. Intragroup Harms

Muslims who attract suspicion solely because of their perceived racial or ethnic identity can try to mitigate skepticism about their "American-ness" through covering techniques that downplay their perceived religious identity: laughing at nervous jokes made at their expense,[71] drawling their English with an obviously domestic accent, staying deferential and cheery in the face of pervasive administrative obstacles,[72] and embracing ultrapatriotism through flags and other symbols of shared civic pride.[73] But when a person is targeted for her performances of religious identity, there can be no escape without forsaking the very conduct she embraces to construct her sense of self.[74] As the Supreme Court has recognized in a different context, "[t]hose who can tax the

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70. Visitors to some conservative Web sites that republished news of the *Tabbaa* detentions often reacted with anger to detainees' claims of innocence. In response to a traveler who was quoted as saying, "If I didn't have on a head covering, I would have never been stopped," Leslie Casimir, *N.Y. Muslim Group Held at Border*, N.Y. DAILY NEWS, Dec. 30, 2004, at 23, one reader commented:

> I invite this b*tch to any airport to see how all Americans are being treated because of a group of muslim terrorists. Then I invite her and her friends into the AZ desert to discuss any further problems she may have on how she's being treated. She won't be complaining anymore.

Jjones9853 [pseud.], Posting of 14:34:53 PST, Free Republic, Dec. 30, 2004, http://www.freerepublic.com/focus/f-news/1311164/posts?page=27#27.

71. *See* Sunita Patel, *Performative Aspects of Race: "Arab, Muslim, and South Asian" Racial Formation After September 11*, 10 UCLA ASIAN PAC. AM. L.J. 61, 62-63, 68 (2005).

72. *See* MacFarquhar, *supra* note 2.

73. *See* Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1584 (2002); Neil MacFarquhar, *To Muslim Girls, Scouts Offer a Chance To Fit In*, N.Y. TIMES, Nov. 28, 2007, at A1.

74. *E.g.*, Patel, *supra* note 71, at 84-85 (describing the "survival tactic" shared by Muslim women and Sikh men of removing their religious head coverings in public, partly "to ward off attention that may lead to harassment or hate violence"); Neil MacFarquhar, *A Simple Scarf, But Meaning Much More Than Faith*, N.Y. TIMES, Sept. 8, 2006, at A22 (interviewing a college student who attributes workplace discrimination, counterterrorism profiling, and "death threats and other offensive telephone calls salted with expletives" to her wearing of hijab); *see also* John Tehranian, *Compulsory Whiteness: Toward a Middle Eastern Legal Scholarship*, 82 IND. L.J. 1, 19 (2007) ("Middle Eastern men will go by the name 'Mike' for Mansour, 'Mory' for Morteza, 'Al' for Ali, and 'Moe' for Mohammed."); MacFarquhar, *supra* note 2 (interviewing a physician who "legally changed his name from Osama to Sam to make his patients more comfortable").

exercise of [a] religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance."[75] When the government targets religious identity performances, it raises the actual or anticipated price of expressing that identity and encourages Muslims to suppress the conduct that defines them as members of their religious community. In other words, the government pressures them to become less discrete, and more discreet.

This cultural tax burden includes dignitary and stigmatic costs incurred by those who are detained indefinitely and processed like terrorists,[76] surrounded by armed guards with guns drawn at them and their families, or shackled to chairs and held incommunicado for hours, wondering if they might be mistakenly "rendered" to another country for torture.[77] Even when these incidents do not stem from cultural profiling per se, they can discourage Muslims' cultural expression by making them fearful of being similarly targeted for attending congregational worship services,[78] providing religiously mandated alms,[79] or attending spiritually significant events overseas.[80] The aggregate result may be the suppression of community-constitutive activities, not through the natural ebb and flow of the social dialectic and generational change, but through the government's presentation of accelerated

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75. Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943).

76. *E.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 98 (2d Cir. 2007) (noting that while "police searches of subway passengers' bags . . . [that are] conducted 'out in the open . . . reduce[] the fear and stigma that removal to a hidden area can cause,'" the *Tabbaa* plaintiffs "not unreasonabl[y] . . . felt there was a stigma attached" to being gathered into a separate building with other RIS attendees and subjected to treatment "normally reserved for suspected terrorists" (citation omitted) (quoting MacWade v. Kelly, 460 F.3d 260, 273 (2d Cir. 2006))).

77. *Cf.* Rahman v. Chertoff, 244 F.R.D. 443, 453-54 (N.D. Ill. 2007) (granting class certification and denying the government defendants' motion to dismiss a class action suit filed against DHS by seven American citizens and residents with "Muslim-sounding" names, including one Christian, to challenge their erroneous placement on terrorist watchlists that have led to repeated wrongful detentions at gunpoint, handcuffing, and interrogations of them and their families upon their returns from abroad); *see also* Neil MacFarquhar, *Arab-Americans Sue U.S. over Re-Entry Procedures*, N.Y. TIMES, June 20, 2006, at A12.

78. *See* Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1232-44 (2004) (arguing that post-September 11 FBI policies of preemptively monitoring and infiltrating mosques have inhibited mosque attendance and other Muslim religious activities).

79. *See* Neil MacFarquhar, *Fears of Inquiry Dampen Giving by U.S. Muslims*, N.Y. TIMES, Oct. 30, 2006, at A1 (reporting that American Muslims may be cutting back on their performance of *zakat* for fear that "donations to an Islamic charity could bring unwanted attention from federal agents looking into potential ties to terrorism").

80. *See* Frank James, *Muslims in U.S. Raise an Outcry: Travelers Object to Border Scrutiny*, CHI. TRIB., Jan. 24, 2005, at A1.

assimilation—under threat of coercive investigation—as the only ready escape from pervasive indignity and fear.[81]

The geographically boundless nature of the "war on terror" means that cultural profiling could target Muslims' identity performances halfway across the world as easily as those within their own neighborhoods. If intelligence suggested that someone with terrorist connections might enter the United States from Mecca following the Hajj, DHS might then reapply the policy in *Tabbaa* to the thousands of American Muslims who return every year from that pilgrimage, detaining and interrogating them all solely for performing a once-in-a-lifetime religious obligation.[82] Or suppose that based on information that an administrator at a domestic Islamic academy had laundered school funds to terrorism-associated individuals,[83] the federal government institutes a program to interview or audit the taxes of anyone who raised money or claimed tax deductions for charitable contributions to other Islamic private schools. This profile would overwhelmingly target Muslims, implicating freedom of speech or a parent's right to direct her child's education.[84] Yet it would be difficult to show that such a policy was intentionally designed to inhibit the exercise of those rights.[85] One possible effect would be the chilling of American Muslims' willingness to devote themselves to fostering group identity through religious education, knowing that this might expose them to misplaced government attention. Those who fear the potential consequences of being mislabeled "suspicious" in light of other high-profile government misidentifications—and

81. *E.g.*, Tehranian, *supra* note 74, at 20 ("In the post-9/11 world, I do not go to the airport without shaving first. It is covering, plain and simple, and a rational survival strategy. I prefer the close shave to the close full-body-cavity search.").

82. *See* Ian Hoffman, *How U.S. 'Harassed' Bay Area Muslim: Customs Delay Imam Who Advised Bush*, OAKLAND TRIB., Jan. 16, 2005, at 1 (quoting customs officials' refusal to confirm that returning pilgrims would not be "detained, photographed and fingerprinted"); James, *supra* note 80 (noting that following news of the *Tabbaa* detentions, "a lot of the [up to 12,000 Americans who went on Hajj] fear they will face the same treatment before being allowed to reenter the United States").

83. *E.g.*, Stephanie Hanes, Lynn Anderson & Richard Irwin, *Alleged Hamas Figure Arrested by Md. Police*, SUN (Balt.), Aug. 24, 2004, at 1A (reporting allegations that one former such school accountant had laundered money for Hamas).

84. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

85. *See* Penn-Field Indus., Inc., v. Comm'r, 74 T.C. 720, 723 (1980) (noting that claims of discriminatory tax audits must show, inter alia, that they were based on "impermissible considerations" such as religion or the desire to inhibit constitutional conduct).

the resulting abuse of those so misidentified—might instead forgo the very activities that construct and sustain their religious community.[86]

B. Intergroup Harms

Distinct from concerns about the aggregate effects of individual burdens are questions about the effects upon the social meaning of Muslim identity and how non-Muslims perceive and relate to American Muslims generally. Executive enforcement and judicial endorsement of cultural profiles can stigmatize Muslim identity performances as presumptively disloyal and unworthy of empathy, making other members of the polity reluctant to associate with American Muslims and their interests.[87] Two particular effects that this stigmatization has upon on third parties are the legitimization of anti-Muslim animus and the discrediting of Muslim participation in civic culture.

1. Ratifying Animus and Encouraging Stereotypes

When the federal government treats group membership as probative of illegal activity, it instructs the polity that such group-based presumptions are legitimate and consistent with our shared civic culture.[88] As shown during the FBI's PENTTBOM investigation following the September 11 attacks, such stigmatic messages can trigger irrational responses from otherwise functional individuals. Over seven hundred Muslim men in the New York metropolitan area alone were arrested on minor criminal or immigration charges and designated "September 11 detainees"; many of them were further designated as being "of high interest" to the investigation and segregated in high-security prison facilities located in Brooklyn and New Jersey. Even though the men had

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86. *See* MacFarquhar, *supra* note 79 (quoting an accountant who believes a drop in Muslim alms-giving is due to "a lack of trust in the U.S. judicial system, with just an accusation you could end up in jail with secret evidence used as a means of prosecution"); *see also supra* notes 79-81; *cf.* Alisa Solomon, *Fleeing America*, VILLAGE VOICE, Sept. 10, 2003, at 34 (reporting on claims that large numbers of the New York metropolitan area's Pakistani community emigrated to other countries in response to post-September 11 conditions).

87. *See generally* Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 98 (1999) (discussing racial stigma in part as "an aversion to being associated with African Americans and their interests").

88. For example, border agents' use of "apparent Mexican ancestry" as a proxy for undocumented immigration status at roadside checkpoints—and the Supreme Court's endorsement of such a profile—"leads us to think of persons of 'apparent Mexican ancestry' as non-citizens." Fiss, *supra* note 32, at 3 (discussing United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

no involvement with the attacks, this "high interest" designation coupled with their religious identity inspired prison guards to presume that they were terrorists who deserved to be beaten and degraded[89] – leading the government to settle at least one lawsuit by a former detainee for hundreds of thousands of dollars.[90]

Many Americans already believe that their Muslim compatriots are disposed to sedition and sympathy with those who attacked this country simply by virtue of a shared religious label.[91] Anti-Muslim animus has motivated attacks upon individuals engaged in identity performances perceived to be expressions of that label, such as by stabbing a Marine corporal's hijab-wearing mother in broad daylight,[92] attacking mosques with firebombs and pig heads while congregants pray,[93] and slaying turban-wearing adherents of other faiths in the hope of killing Muslims.[94] Federal agents have also given coercive effect to private cultural profiling efforts, such as when a passenger aircraft crew kicked a Muslim doctor and his companions off their plane for trying to pray inconspicuously, and another crew refused to fly at all unless passengers wearing traditional Afghan dress were run through a second security screening.[95]

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89. *See* Turkmen v. Ashcroft, No. 02-CV-2307, 2006 U.S. Dist. LEXIS 39170 (E.D.N.Y. June 14, 2006) (denying the government's motion to dismiss with respect to conditions of confinement claims brought by former PENTTBOM detainees); Elmaghraby v. Ashcroft, No. 04-CV-1409, 2005 WL 2375202, at *1-16 (E.D.N.Y. Sept. 27, 2005) (detailing allegations of abuse by detainees Ehab Elmaghraby and Javaid Iqbal); OFFICE OF THE INSPECTOR GEN., *supra* note 15, at 162; *see also* Eggen, *Tapes Show Abuse of 9/11 Detainees*, *supra* note 15.

90. Nina Bernstein, *U.S. Is Settling Detainee's Suit in 9/11 Sweep*, N.Y. TIMES, Feb. 28, 2006, at A1 (reporting on settlement with Ehab Elmaghraby).

91. According to one Gallup poll, half of all Americans would not characterize their Muslim compatriots as loyal to this country, and the same number refused to say that American Muslims do not sympathize with al Qaeda. *See* Saad, *supra* note 14.

92. Caryle Murphy, *Muslim Mother in Fairfax Assault Has Marine Son: Attacker Shouted 'Terrorist' After Stabbing, Woman Says*, WASH. POST, Oct. 9, 2003, at B7.

93. *E.g.*, James Boyd, *Local Mosque Hit by Firebomb*, HERALD-TIMES (Bloomington), July 10, 2005, at A1; Justin Ellis, *Muslims Urge Respect for Religion After Hate Crime*, PORTLAND PRESS HERALD, July 6, 2006, at A1.

94. Howard Fischer, *Post-Sept. 11 Drive-By Killer Gets Life Term*, ARIZ. DAILY STAR, Aug. 15, 2006, at B6 (reporting on a man who murdered a Sikh gas station owner during a shooting spree targeting those he thought were Arab or Muslim); *see also* John Coté, *Hate Crime Alleged in Stabbing of Sikh*, S.F. CHRON., Aug. 2, 2006, at B10 (reporting on the arraignment of a man accused of stabbing his Sikh neighbor whom he believed to belong to the Taliban).

95. Mary Agnes Welch, *MDs Forced Off Plane: Winnipeg Residents, One Muslim, Falsely ID'd as Terrorists*, WINNIPEG FREE PRESS, Aug. 18, 2006, at B1; Leslie Wright, Sky Barsch & Adam Silverman, *Security Concerns Delay Flight to Vt.*, BURLINGTON FREE PRESS, July 3, 2007, at 1A.

As the most prominent actor within civic culture, the government risks further "inscrib[ing] disloyalty"[96] upon the social meaning of Muslims' group identity by endorsing the belief that their identity performances may reliably be viewed as masking actionable threats. Internet commentary in the wake of the *Tabbaa* detentions suggests that the government's profiling of Islamic conference attendance—and the district court's affirmation of that policy—was welcomed by some as official recognition of the threat they perceive from Muslims in America.[97] Even some Internet posters whose comments did not manifest an overt hated of Muslims nonetheless overestimated the profile's accuracy and drew an "illusory correlation"[98] between the erroneously targeted conference-goers and the government's intimation of subversive activity.[99]

2. *Discrediting Civic Participation*

By stigmatizing a cultural minority's identity performances as presumptively disloyal, cultural profiling can lower the value of participating in public life as an identifiable member of that community. Ordinarily, a minority's distinctive participation within the civic sphere can spur what John Hart Ely described as "[i]ncreased social intercourse [that] is likely not only to diminish the hostility that often accompanies unfamiliarity, but also to rein

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96. *See* Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 2 (2002).

97. *E.g.*, dagnabbit [pseud.], Posting of 17:16 PST, Free Republic, Dec. 30, 2004, http://www.freerepublic.com/focus/f-news/1311164/posts?q=1&;page=144#144 ("I commend the inspectors for putting these Muhammadeans through the wringer after their little Canadian jihad rally."); faqi [pseud.], Posting of 3:29 PM, Dhimmi Watch, Dec. 24, 2005, http://www.jihadwatch.org/dhimmiwatch/archives/009531.php#c156234 ("We need more judges like, Judge William Skretny, in our judicial system. Islam is the curse of the 21st century. If they don't like to be searched they could always LEAVE; no one invited them here. God bless Judge Skretny."); loonophobe [pseud.], Posting of 10:57 AM, Little Green Footballs, Dec. 31, 2004, http://littlegreenfootballs.com/weblog/?entry=14144#c0181 ("[E]very person who complained about this detainment [should] be put on a list . . . .").

98. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1195-98 (1995).

99. Discussing a news report stating only that "agents acted on intelligence that conventioneers may have terrorists in their cars," Casimir, *supra* note 70, one poster declared the *Tabbaa* detainees to be "obviously suspicious citizens" who were appropriately fingerprinted. Miss Marple [pseud.], Posting of 5:04 p.m. (PST), Free Republic, Dec. 30, 2004, http://www.freerepublic.com/focus/f-news/1311164/posts?page=132#132. Another poster similarly concluded that the RIS Conference was, without qualification, "a suspicious conference." FreeReign [pseud.], Posting of 6:32 p.m. (PST), Free Republic, Jan. 1, 2005, http://www.freerepublic.com/focus/f-news/1311164/posts?page=571#571.

somewhat our tendency to stereotype."[100] In this way, social equality can flow from a minority's use of civic equality to demonstrate its commitment to this country and to cultivate a sense of shared purpose with other social communities. Civic engagement can help disparate social groups "apprehend those overlapping interests that can bind them into a majority on a given issue," because "[t]he more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation."[101] Following Reconstruction, the Supreme Court began elaborating such a theory of political cooperation by removing stigmatic bars to minorities' civic participation.[102] Such efforts were intended to let the members of these groups seek the equal regard necessary to combat private discrimination on their own. Today, however, even without an outright denial of constitutional rights, government action that indirectly stigmatizes Muslims can deny them the equal regard by their compatriots that is necessary for effective mobilization in the civic sphere.[103]

Profiling's use of Muslim identity performances as a proxy for disloyalty can inflict what R.A. Lenhardt, in the context of racial discrimination, has termed "citizenship harms."[104] These occur when stigmatic messages undermine a minority's efforts to advance its interests by becoming "accepted as a full participant in the relationships, conversations, and processes that are so important to community life."[105] In the counterterrorism context, citizenship harms may lead observers to assume that an individual's words and deeds

100. JOHN HART ELY, DEMOCRACY AND DISTRUST 161 (1980).

101. *Id.* at 153, 161 (footnote omitted).

102. In *Strauder v. West Virginia*, 100 U.S. 303 (1879), the Court invalidated a law barring blacks from serving on juries because such civic exclusion was "practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others." *Id.* at 308. Similarly, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), invalidated city ordinances that permitted arbitrary interference with Chinese immigrants' ability to engage in one of the few avenues of public commerce open to them. Even the refusal of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to integrate a common carrier railway was grounded on the same theory that unfettered access to the civic sphere should be sufficient in a democracy for minorities to shape the private sphere. *Id.* at 551.

103. *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 846 (2004).

104. *See id.* at 844-47.

105. *Id.* at 844.

regarding any number of issues should be discredited by virtue of that person's actual or perceived Muslim identity.[106]

These harms are especially significant when cultural profiling targets the religiously motivated exercise of a universally held political right, as with the *Tabbaa* profile's disparate focus on Muslims who were exercising their freedoms of speech and association. Those travelers openly availed themselves of their First Amendment rights to express themselves, cultivate community solidarity, and offer a positive example for others of what they believed Islam in North America should be. But upon their return home they were greeted as though they were terrorists and interrogated about whether they were plotting to harm their fellow citizens. Even if individual Muslims themselves remain undeterred by such experiences, branding Muslims as people whose exercise of First Amendment rights should be viewed with suspicion can discredit a significant value of such expression: to bolster Muslims' credibility in the eyes of skeptical compatriots by demonstrating their commitment to American constitutional culture. Despite Muslims' recent successes in building local political coalitions with non-Muslims,[107] federal policies that treat their religiously motivated civic expression as a valid basis for suspicion can jeopardize their prospects for such bridge-building nationally.[108] By legitimizing the perception that Muslim identity is inherently probative of

106. One need only consider the aspersions cast upon the loyalties of U.S. Senator Barack Obama during his 2008 presidential campaign. *See* Perry Bacon Jr., *Foes Use Obama's Muslim Connections Fuel Rumors About His Faith*, WASH. POST, Nov. 29, 2007, at A1. Early in the race, certain commentators delighted in highlighting that his middle name is "Hussein," and others regularly cited his childhood enrollment in a Muslim school in Indonesia as time spent in a "madrassa" – capitalizing on how the generic Arabic word for "school" is firmly linked in American consciousness to religious centers run by radical Islamists. *CNN Debunks False Report About Obama*, CNN.COM, Jan. 23, 2007, http://www.cnn.com/2007/POLITICS/01/22/obama.madrassa; *Schlussel: Should Barack Hussein Obama Be President "When We Are Fighting the War of Our Lives Against Islam"?*, MEDIA MATTERS, Dec. 20, 2006, http://mediamatters.org/items/200612200005 (citing discussions of Obama's middle name); *see also supra* text accompanying note 1.

107. *See, e.g.*, Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073, 1125 (2005) ("The impact of Muslim and Arab politicization has been felt in many cities where Arab-American activists were instrumental in successful campaigns to pass resolutions condemning the PATRIOT Act . . . .").

108. A similar phenomenon may have chilled the civil rights movement during the upswing of McCarthyism and anti-Communist fervor, as black leaders sought to disentangle their fight against the existing stigmatization of blacks as "inferior" from any additional stigmatization as "disloyal." Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 80-81 (1994); *see also* Lenhardt, *supra* note 103, at 846-47 & n.221 (arguing that racially stigmatic citizenship harms have contributed to African-Americans' difficulty winning statewide positions despite electoral successes in citywide and congressional races).

disloyalty, government can encourage the polity to view Muslims—even native-born Americans—as dangerously foreign to the community of presumptively loyal citizens.[109]

III. THE DOCTRINAL GAP BETWEEN EQUAL PROTECTION AND THE FIRST AMENDMENT

When stigmatization by administrative agents further impedes a minority's access to political avenues for change, litigation may remain the only potential recourse to clear these "stoppages in the democratic process."[110] Yet the Equal Protection Clause does not protect identity performances, and the Free Speech Clause does not encourage judicial concern for cultural profiling's group harms. The Free Exercise Clause and the original intuitions motivating its ratification—a national concern for the rights of especially vulnerable groups and an awareness of historical discrimination against them[111]—might seem to bridge this doctrinal gap. Even though the free exercise of religion is an individually held right, "religious activity derives meaning in large measure from participation in a larger religious community" that "represents an ongoing tradition of shared beliefs" distinct from, yet dependent upon, the individual.[112] In other words, if equal protection doctrine protects group *status* and freedom of speech protects individual *expression*, the Free Exercise Clause could be read as protecting individual expressions of group status, at least where that status consists of membership in a religious collectivity. However,

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109. Volpp, *supra* note 73, at 1594-95. Reacting to reports of a *Tabbaa* detainee who said, "[I] really feel like a criminal and [I] haven't done anything wrong," one Internet poster wrote, "Our civil liberties aren't up to your standards . . . ? Try living in whichever one of the 22 shitholes your ancestors emigrated from." David Simon [pseud.], Posting of 11:01 a.m. (PST), Little Green Footballs, Dec. 30, 2004, http://littlegreenfootballs.com/weblog/?entry=14144#c0086; *see also, e.g.*, FormerACLUmember [pseud.], Posting of 3:15 p.m. (PST), Free Republic, Dec. 30, 2004, http://www.freerepublic.com/focus/f-news/1311164/posts?page=55#55 ("Coming back from an IslamoFascist love fest in Canada? Get out of my country you vermin. Go back to whatever hell holes you monsters crawled out of."); Havoc [pseud.], Posting of 10:25 a.m. (PST), Jihad Watch, Apr. 27, 2005, http://www.jihadwatch.org/archives/005907.php#c85487 ("Let's keep it simple: No muslims; No mosques. Deport them; Demolish them.").

110. ELY, *supra* note 100, at 117.

111. *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421-30 (1990); Yang, *supra* note 3, at 125-26, 136-37.

112. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring); *see also* Meyler, *supra* note 30, at 285, 294-95.

as discussed above,[113] *Smith* harmonized free exercise doctrine with the formal anticlassification principle already at play in the Court's interpretations of these two other doctrines. As a result, all three clauses now fail to offer plaintiffs and judges any group-protective theory by which to critique cultural profiling.

A. Equal Protection Doctrine's Inapplicability to Cultural Profiling

Contemporary equal protection doctrine cannot reach cultural profiling policies promulgated in good faith. Even if they impose disproportionate burdens upon a single ethnic or religious minority, such profiles do not employ ascriptive status classifications that courts find presumptively suspect. In *Washington v. Davis*, the Supreme Court held that disparate racial impact alone, without the use of a suspect classification, would not create an equal protection violation absent a showing of racially discriminatory purpose.[114] Shortly thereafter, *Personnel Administrator v. Feeney* further defined "discriminatory purpose" as the specific intent to adversely affect a particular group.[115] *Feeney* reviewed Massachusetts's policy of extending civil service hiring preferences to military veterans. Women had historically been excluded from military service and almost all of the state's veterans were male, so these hiring preferences routinely shut women out of desirable government posts they otherwise would have received.[116] The Court set out a "twofold inquiry" for reviewing challenges to a facially neutral statute with disparate effects on a protected group.[117] The plaintiff first may try to show that the classification is not neutral because its scope is almost identical to that of an inherently suspect distinction. Failing that, the plaintiff instead must attack the underlying intent and show that "the adverse effect reflects invidious . . . discrimination."[118]

The *Feeney* Court found that the veteran preference was neutral and not gender-based because it also disadvantaged significant numbers of nonveteran men. The Court thus elaborated a theory of equal protection whereby the government may "neutrally" benefit or burden individuals who comprise a

113. *See supra* notes 30-31 and accompanying text.

114. 426 U.S. 229, 245 (1976); *see also* Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977).

115. 442 U.S. 256 (1979); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1135 (1997) (reading *Feeney* as requiring showings of a "legislative state of mind akin to malice").

116. *Feeney*, 442 U.S. at 270-71.

117. *Id.* at 274.

118. *Id.*

subset of a suspect classification, as long as the subset is too small to serve as a pretext for targeting the entire suspect classification.[119] The Court also found that plaintiffs must show that challenged government action was based "at least in part 'because of,' not merely 'in spite of,' its adverse effect upon an identifiable group."[120] Accordingly, while the legislators could have easily foreseen the collateral damage of their gender-correlated program, their indifference to those consequences did not constitute a discriminatory purpose.

Although the *Davis/Feeney* framework requires proof of discriminatory animus, cultural profiling need not be motivated by invidious intent. Unconscious or "implicit" bias can influence the interpretation of extrinsic information,[121] leading to the creation of facially neutral policies that are as burdensome on innocents as those motivated by animus—but without triggering an equal protection claim. Suppose that without any conscious racial animus, a Southern sheriff sets up checkpoints to search for "unlicensed drivers" attending a local rap concert, yet never creates such checkpoints for local rodeos because he does not think unlicensed drivers would attend the latter.[122] Curbing unlicensed driving certainly constitutes a generally applicable governmental interest, but the sheriff's failure to pursue that goal among the largely white audiences at rodeos seems counterproductive. His policy would appear *underinclusive* because his chosen proxy—attendance at a rap concert—is too narrow and indistinctly related to the threat of unlicensed driving that he seeks to prevent. His profile's failure to target the full range of potential risks renders it ineffective; he has inordinately focused on threats that he can easily and vividly imagine, to the exclusion of similarly likely sources of risk. This underinclusion may stem from the cognitive shortcuts and unconscious biases that shape probability judgments.[123] Regardless, the lack of conscious intent on the part of the sheriff and similarly situated policymakers puts their actions outside the reach of the Equal Protection Clause.

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119. *See id.* at 275; *see also* Geduldig v. Aiello, 417 U.S. 484, 486, 496 n.20 (1974) (holding that the specific exclusion of "certain disabilities resulting from pregnancy" from state disability coverage did not violate the Equal Protection Clause because of "[t]he lack of identity" between pregnancy and gender).

120. 442 U.S. at 279. *Feeney* found no evidence to suggest that the policy had "the collateral goal of keeping women in a stereotypic and predefined place." *Id.*

121. *See generally* R. Richard Banks, Jennifer L. Eberhardt & Lee Ross, *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006); Krieger, *supra* note 98.

122. *See* Collins v. Ainsworth, 382 F.3d 529, 534 (5th Cir. 2004).

123. *See supra* notes 60-63 and accompanying text.

Conscious indifference to the externalized costs of a dragnet can also lead to *overinclusive* cultural profiles that do not offend equal protection doctrine. Where a policy is based on extrinsic information such as witness accounts, plaintiffs cannot show that a profile's disparate effect on their community is the product of discriminatory purpose, no matter how tenuous the probabilistic logic at work.[124] Although the *Tabbaa* plaintiffs did not present an equal protection claim, the district court's discussion of DHS's policy echoed *Feeney*'s twofold inquiry into neutrality and intent. Finding that the policy did not target all Muslims[125] and that the government's "intention was benign,"[126] the court concluded that the government's "specific concerns"[127] about potential attendees at one of the conferences justified its efforts "to prevent terrorists from entering this country."[128] Despite the small mathematical likelihood that any given conference-goer would have actually encountered a terrorist, the cultural profile's formal neutrality and nonmalignant intent convinced the court that the measure lay beyond constitutional reproach.

B. The Free Speech Clause's Indifference to Group Harms

As in *Tabbaa*, cultural profiling may implicate the Free Speech Clause by targeting religiously motivated speech or association. However, the Clause does not give judges who review such policies any doctrinal tools with which to account for group-subordinating harms when balancing the interests at stake. Freedom of speech doctrine does not share equal protection's historical attention to group-based discrimination, and is guided instead by principles of facial neutrality that disfavor the government's use of express content-based classifications.[129] The doctrine only protects expression *qua* expression, without

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124. *E.g.*, Brown v. City of Oneonta, 221 F.3d 329, 333-34 (2d Cir. 2000) (holding that absent "discriminatory racial animus," the profiling of almost all of a small city's minority population need only withstand rational basis review under the Equal Protection Clause because the profile was based on a crime victim's firsthand description of the suspect, despite the description's almost exclusive reliance on race and gender).

125. Tabbaa v. Chertoff, No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189, at *47 (W.D.N.Y. Dec. 21, 2005), *aff'd*, 509 F.3d 89 (2d Cir. 2007).

126. *Id.* at *45 ("[T]he government's action . . . [was not taken] to punish Plaintiffs for being Muslim or associating themselves with other Muslims at the RIS conference.").

127. *Id.* at *6, 8.

128. *Id.* at *45.

129. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828-29 (1995); Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2425-26 (2003).

regard for its social meaning to certain audiences[130] or the identity of the speaker.[131] This "profound individualism" is shaped by "a tendency [in American law] to view groups as mere collections of individuals, whose claims are no greater than those of their constituent members."[132]

Under the two most prominent theories of the Free Speech Clause, a speaker's identity is irrelevant. Alexander Meiklejohn's seminal theory of democratic self-governance posits that freedom of speech is merely a means to the end of the audience's collective deliberation; the speaker's personal fulfillment is of no concern.[133] Alternatively, an autonomy-based rationale grounds freedom of expression in "the Kantian right of each individual to be treated as an end in himself . . . ."[134] Neither theory attends to how expression can help individuals construct and sustain a cultural community with its own identity. Courts therefore have no reason to examine how burdens upon culturally expressive speech or association can inflict uniquely destructive chilling effects and stigmatic injuries upon such a community.

Instead, freedom of speech doctrine presumes the equal vulnerability of all numerical minorities without regard for why they are speaking.[135] It certainly

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130. *E.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (overturning a criminal defendant's cross-burning conviction under a municipal hate crimes ordinance because the law was facially unconstitutional, having prohibited the use of fighting words only where such expression provoked a reaction "on the basis of race, color, creed, religion or gender").

131. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source . . . .").

132. Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 293-94 (1991) (internal quotation marks omitted) (citations omitted).

133. *See, e.g.*, Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 ("The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility."); *accord* Connick v. Myers, 461 U.S. 138, 161 (1983) ("We have long recognized that one of the central purposes of the First Amendment's guarantee of freedom of expression is to protect the dissemination of information on the basis of which members of our society may make reasoned decisions about the government.").

134. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992); *accord Bellotti*, 435 U.S. at 777 n.12 ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge."); *see* THOMAS I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1966) (viewing expression as "an integral part of the development of ideas, of mental exploration and of the affirmation of self").

135. "[T]he purpose or motive of the speaker" may "bear on the distinction between regulatable activity and 'an associational aspect of expression.'" *In re* Primus, 436 U.S. 412, 438 n.32 (1978) (quoting Thomas I. Emerson, *Freedom of Association and Freedom of Expression*, 74

recognizes a plaintiff's argument that a regulation will chill the expression of those who are not party to her lawsuit; it may even recognize her claim that a regulation has devalued her expression by stigmatizing her as someone not to be listened to.[136] But the doctrine's wariness of discouraging individual expression does not compel further judicial skepticism if the litigants happen to be members of a vulnerable social community. Thus a *Tabbaa*-style policy's effect on Muslims attending a future Islamic conference may represent no greater burden upon freedom of speech than that imposed upon, for example, atheist Swedish professors of Middle Eastern history who might be detained after attending the same conference. Yet such detentions would have profoundly different intragroup and intergroup effects.

C. *The Free Exercise Clause's Convergence with Equal Protection Doctrine*

One analysis of Founding-era religious freedom protections suggests that "the concept of equal protection initially emanated out of an attempt to ensure free exercise," as "[v]arious state constitutions referred to the equal protection of individuals within different religious denominations and to the equal privileges and immunities or equal civil rights that they should enjoy."[137] Today, free exercise doctrine also mirrors equal protection doctrine—but only because neither adequately accounts for the group-subordinating harms of government policies.[138]

1. *The Evolution of Free Exercise Doctrine*

In the late nineteenth century, the strong Mormon presence and practice of polygamy in western territories led the Supreme Court to conclude in *Reynolds v. United States* that while government action may not "interfere with mere

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YALE L.J. 1, 26 (1964)). But those motives are only relevant for the threshold question of whether the speaker is exercising her "'freedom to engage in association for the advancement of beliefs and ideas.'" *Id.* (quoting NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958)). It is otherwise "immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters." *Patterson*, 357 U.S. at 460.

136. *See* Vanasco v. Schwartz, 401 F. Supp. 87, 97-98 (E.D.N.Y. 1975) (three-judge court) (invalidating a state election board's "Fair Campaign Code" due to its "substantial chilling effect" on political candidates' constitutionally protected speech caused partly by the "adverse publicity" resulting from an administrative proceeding or even an opponent's mere filing of an administrative complaint), *aff'd*, 423 U.S. 1041 (1976).

137. Meyler, *supra* note 30, at 276, 277.

138. *Id.*

religious belief and opinions, [it] may with practices."[139] The Court rejected a Mormon's free exercise challenge to his conviction under Congress's antipolygamy statute, because granting his religious belief priority over federal law would "permit every citizen to become a law unto himself."[140] After upholding *Reynolds* in the context of other polygamy cases, the Court continued into the 1930s to emphasize that religious minorities were not exempt from generally applicable laws simply because the measures burdened the expression of personal religious convictions.[141]

The New Deal Court incorporated free exercise rights against the states in *Cantwell v. Connecticut*, which invalidated the conviction of three Jehovah's Witnesses for violating a religious solicitation licensing system and for common law breach of the peace.[142] While acknowledging that "[c]onduct remains subject to regulation for the protection of society," the Court began to speak of the need to inquire whether restraints on religious activity were "narrowly drawn to prevent the supposed evil."[143] The following decades saw the Court attend to the relationship between individuals, the religious groups to which they belong, and their vulnerability even to unintentionally harmful governmental decision making. A number of mixed speech and religion cases in the 1940s vindicated the rights of other Jehovah's Witnesses by invalidating laws that burdened them uniquely and were not narrowly tailored.[144] The Warren Court later announced a formal strict scrutiny standard in *Sherbert v. Verner* that applied even to incidental burdens on free exercise.[145] Under the *Sherbert* test, the government must prove that the application of the challenged policy to the individual claimant was the least restrictive means of furthering a "compelling state interest."[146] Nine years later, *Wisconsin v. Yoder*[147] drew upon

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139. 98 U.S. 145, 166 (1878); *see also* John W. Whitehead, *The Conservative Supreme Court and the Demise of the Free Exercise of Religion*, 7 TEMP. POL. & CIV. RTS. L. REV. 1, 33-36 (1997).

140. *Reynolds*, 98 U.S. at 167.

141. *See* Whitehead, *supra* note 139, at 34, 61-62 (discussing cases).

142. 310 U.S. 296 (1940).

143. *Id.* at 304, 307.

144. *E.g.*, Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas where the ordinance was neither "directed to the problems with which the police power of the state is free to deal" nor "narrowly drawn to safeguard the people of the community in their homes against the evils of solicitations").

145. 374 U.S. 398 (1963) (holding unconstitutional the denial of unemployment benefits to a Seventh-Day Adventist because she refused to work on Saturday, her faith's Sabbath).

146. *Id.* at 406.

147. 406 U.S. 205 (1972).

Sherbert when it concluded that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion."[148]

In the 1980s, however, religious plaintiffs encountered a federal judiciary that was highly skeptical about what constituted a "legitimate" free exercise claim.[149] The Rehnquist Court often subordinated religious minorities' free exercise claims to the demands of bureaucratic efficiency, eventually constitutionalizing this skepticism in *Smith*.[150] There, the Court held that because Oregon had validly criminalized the use of peyote generally, it could deny unemployment benefits to two Native Americans who had ingested the drug at a religious ceremony and were then fired for breaking the law.[151] Justice Scalia's opinion for the Court declared that the Free Exercise Clause "has not been offended" when neutral and generally applicable government action incidentally burdens "religiously motivated" activity.[152] The opinion expressly noted that this principle was no different than the anticlassification orientation in the Court's equal protection and free speech jurisprudence.[153] It then invoked both *Reynolds* and "society's diversity of religious beliefs" as reasons not to grant exemptions to neutral laws, lest courts create "a system in which each conscience is a law unto itself."[154]

The *Smith* Court distinguished *Sherbert* and three other unemployment benefits cases that had cited *Sherbert*'s strict scrutiny test to the benefit of religious plaintiffs, finding those cases sui generis since they involved only ad hoc, routinely individualized administrative determinations.[155] *Yoder* then remained as the one occasion where the Court had invoked *Sherbert* while

148. *Id.* at 215 (citing *Sherbert*).

149. *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1417 (1992) (finding that eighty-eight percent of Supreme Court and federal appellate free exercise decisions between 1980 and 1990 denied plaintiffs' request for exemptions).

150. Employment Div. v. Smith, 494 U.S. 872 (1990); *see* Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Bowen v. Roy, 476 U.S. 693 (1986); Goldman v. Weinberger, 475 U.S. 503 (1986); *see also* Whitehead, *supra* note 139, at 101-16 (discussing cases).

151. *Smith*, 494 U.S. at 890.

152. *Id.* at 878, 881.

153. *Id.* at 886 n.3.

154. *Id.* at 888, 890.

155. *Id.* at 884-85; *see also* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981).

exempting "religiously motivated action" from generally applicable regulation.[156] Justice Scalia distinguished *Yoder* by lumping it together with several 1940s Jehovah's Witness decisions and characterizing them all as "hybrid situation[s]" involving the Free Exercise Clause "in conjunction with" another constitutional protection.[157] Therefore, absent a hybrid situation, *Smith*'s reframing of the Free Exercise Clause left religiously motivated activity no protection whatsoever from neutral burdens of general application.[158]

2. *Obstacles to Challenging Cultural Profiling Under* Smith

To challenge cultural profiling of religiously motivated activity under *Smith*'s rule, plaintiffs must attack the policy's neutrality or general applicability. A measure is not neutral if its object "is to infringe upon or restrict practices because of their religious motivation,"[159] akin to *Feeney*'s view of discriminatory purpose as the intent to act "'because of,'" as opposed to "'in spite of,'" a policy's effects upon the plaintiffs.[160] Although the Court has not precisely defined the general applicability standard,[161] the requirement ensures that a rule's exceptions for nonreligious activity do not undermine the rule altogether.[162] The inquiry first identifies the governmental interests supposedly served by the challenged measure, and then determines whether the measure substantially fails to regulate "nonreligious conduct that endangers these interests in a similar or greater degree than [the burdened religious activity] does."[163]

A reviewing court would likely conclude that a cultural profile is neutral where it is based not on animus but extrinsic information.[164] In that case, a plaintiff must instead attack the profile as lacking general application. The

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156. *See Smith*, 494 U.S. at 881.

157. *Id.* at 881-82.

158. *See, e.g.*, Christopher C. Lund, *A Matter of Constitutional Luck: The General Applicability Requirement in Free Exercise Jurisprudence*, 26 HARV. J.L. & PUB. POL'Y 627, 656-60 (2003) (discussing failed free exercise challenges to unnecessary state-mandated autopsies despite fierce religious objections by decedents' families).

159. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 533 (1993).

160. *See id.* at 540 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256, 279 (1979)).

161. *See id.* at 543.

162. *See* Lund, *supra* note 158, at 637-39.

163. *Church of the Lukumi Babalu Aye*, 508 U.S. at 543; *see also* Lund, *supra* note 158, at 640-41 & n.58.

164. *See supra* notes 124-128 and accompanying text.

court would examine how the government has defined its underlying interests and why it has identified certain activities and not others as posing the greatest threat to those interests. Even a skeptical judge will likely defer to how counterterrorism officials set their investigatory priorities in response to the information they collect and interpret.[165] This deference may enable the government successfully to frame its counterterrorism interests in broad tautological terms: that its profiling efforts seek to prevent those terrorist threats that it has determined to be most worth preventing. The government might then assert that the gravest threat "is posed by the criminal enterprise known as al Qaeda,"[166] whose members, as with most gangs, are bound together by a shared social identity, and that little else is known about these individuals besides the fact of their Muslim identity. Accordingly, the government might argue that it is logical to focus on activities strongly correlated with Muslim identity and counterproductive to scrutinize nonreligious activities that officials have not concluded would similarly endanger these counterterrorism interests.[167]

Of course, courts might be dubious of this argument if the targeted conduct were seen as so strongly correlated with Muslim identity and little else—such as the performance of prayer five times daily—that it suggests that the government's intelligence is too vague or pretextual to deserve judicial deference. But where courts do not perceive the profiled activity to be essentially expressive of Muslim identity—such as attendance at an Islamic conference—they may be more reluctant to second-guess how counterterrorism officials have acted upon the myriad sources of information available to them. In that case, even where a profiling policy has a disparate impact on the American Muslim community, *Smith*'s general rule could render it safe from a free exercise challenge.

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165. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 707 (6th Cir. 2002) (rejecting the challenged policy of prohibiting public access to immigration removal hearings yet deferring to counterterrorism agents' belief that the revelation of certain information during those proceedings could impede their ongoing investigations, because "[t]hese agents are certainly in a better position to understand the contours of the investigation and the intelligence capabilities of terrorist organizations").

166. *See* R. Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 CORNELL L. REV. 1201, 1215 (2004).

167. *Cf. id.* at 1216 (suggesting that scrutiny of "charitable organizations that send money to Muslim religious groups in countries with an active al Qaeda presence" could be framed not as conventional profiling but as efforts to target a criminal enterprise).

D. First Amendment Strict Scrutiny's Failure To Account for Group Harms

Assuming that a cultural profile were crafted or implemented in such a way as to violate *Smith*'s neutrality or general applicability requirements, the government then would have to demonstrate that its policy was the least restrictive means of furthering its compelling interest in preventing terrorism.[168] Because strict scrutiny under both the Free Exercise Clause and the Free Speech Clause is currently devoid of any group-protective underpinnings, present doctrine leaves plaintiffs and judges bereft of an opportunity to invoke the vocabulary of group harms as a counterbalance to the executive's invocation of national security interests.

Regardless of whether intermediate or strict scrutiny were to apply under the First Amendment,[169] the government's assertion of counterterrorism objectives would typically satisfy the "significant" or "compelling" interest component of those standards.[170] The only remaining question would be whether the challenged policy is "narrowly tailored" or the "least restrictive means" of furthering that interest.[171] Even when the state must justify the

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168. *See* Tabbaa v. Chertoff, No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189, at *49 n.14 (W.D.N.Y. Dec. 21, 2005) (assuming that the policy merited strict scrutiny under the First Amendment and the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), *prior version invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997), which applies even to generally applicable federal policies), *aff'd*, 509 F.3d 89 (2d Cir. 2007).

169. *E.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those *not otherwise served* can overbalance legitimate claims to the free exercise of religion." (emphasis added)); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) ("Infringements on [the right to associate] may be justified by regulations adopted to serve compelling state interests ... that cannot be achieved through means *significantly less restrictive* of associational freedoms." (emphasis added)); United States v. O'Brien, 391 U.S. 367, 377 (1968) (finding that an incidental restriction on speech is permissible where it "furthers an important or substantial governmental interest," "the governmental interest is unrelated to the suppression of free expression," and the restriction "is *no greater than is essential* to the furtherance of that interest" (emphasis added)).

170. *E.g.*, Citizens for Peace in Space v. City of Colo. Springs, 477 F.3d 1212, 1220 (10th Cir. 2007) (finding that a city had a "significant government interest" in preventing terrorist attacks on a NATO defense conference); *Detroit Free Press*, 303 F.3d at 705 ("The Government's ongoing anti-terrorism investigation certainly implicates a compelling interest.").

171. *E.g.*, *Citizens for Peace in Space*, 477 F.3d at 1220 (finding that a prohibition on all protest from a sidewalk opposite a NATO conference withstood intermediate scrutiny because the restriction was narrowly tailored to the city's significant governmental interests); *Detroit Free Press*, 303 F.3d at 705 (holding that a policy prohibiting public access to deportation hearings failed strict scrutiny because it was not narrowly tailored).

policy, Muslim plaintiffs are left facing two complementary background presumptions that tend to favor the government and soften strict scrutiny.

The first presumption, rooted in separation of powers concerns, relates to the uncertain benefits of alternatives to profiling. For a judge to find that a profile is not narrowly tailored, she could conclude that it is insufficiently detailed. But since a vague profile is a product of vague leads that may still be better than nothing, judges might refrain from penalizing the government for the uncertainty inherent in intelligence gathering.[172] Alternatively, the plaintiffs might argue that the government should have used some other equally effective method of achieving the same objective. In *Tabbaa*, alternatives to the cultural profile could have included sending observers to the RIS Conference, coordinating an investigation with Canadian law enforcement, or asking U.S. domestic law enforcement to investigate specific attendees upon their re-entry into the country. Courts may be reluctant, however, to tell executive agents that their chosen method of protecting the country must yield to a hypothetical alternative of untested efficacy.[173] As in *Tabbaa*, the government is likely to argue that no other measure can reduce the risk of terrorist activity as well as the challenged action can. Deference to the executive's national security expertise may counsel judicial self-abnegation in the face of uncertainty about whether other less restrictive but equally efficacious alternatives exist.[174] Intervention despite this uncertainty could leave judges vulnerable to a reviewing court's accusation that they have micromanaged the executive in an area outside core judicial competence. Accordingly, "narrow tailoring" analyses will probably bind counterterrorism officials less tightly than they would other administrative agents.[175]

The second presumption, rooted in cognitive theory, relates to the uncertain costs of eliminating the existing policy. Counterterrorism policies

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172. *E.g.*, Tabbaa v. Chertoff, 509 F.3d 89, 104 (2d Cir. 2007) ("[T]he IDSO was necessary precisely because of the infeasibility of knowing who at the conference may have interacted, and potentially exchanged identification or travel documents, with suspected terrorists.").

173. *E.g.*, *id.* ("These are plainly not viable alternatives.").

174. *E.g.*, *id.* at 106 (finding that "some measure of deference is owed" to CBP's administrative decisionmaking where "border officials potentially faced a highly significant security issue based on the intelligence they received").

175. *E.g.*, *id.* (stating that the deference due CBP's "considered expertise" partly "informed" the conclusion that the profiling and detention policy was narrowly tailored); *Citizens for Peace in Space*, 477 F.3d at 1224-25 (finding that "the catastrophic risk involved" in protecting a NATO conference mandated a more "generous" reading of the narrow tailoring requirement, absent any "obvious" alternatives of equal efficacy).

will often be framed as necessary to stave off disaster,[176] encouraging judges to weigh the costs borne by erroneously targeted individuals against the unknowable costs of ignoring the government's asserted urgency.[177] A purely "transaction-by-transaction" calculus would especially favor the government if the individual harms are "relatively trivial"[178] when contrasted with the vividly contemplated prospect of an attack wrought by a terrorist who snuck across the border, or who boarded and then hijacked a plane, or who blended into a crowd of protestors.[179]

Such a framing ignores the cumulative burden that cultural profiling could have on American Muslims as a group.[180] Stigmatization, the ratification of private animus, and pervasive deterrence of community-constitutive activity are all missing from this equation because freedom of speech and free exercise doctrines do not currently encourage judges to balance their intuitions about risk against their intuitions about harm to minority groups. The next Part argues that plaintiffs can inspire such judicial solicitude by using "hybrid situations" as opportunities to reimport the language of community harm into the Free Exercise Clause.

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176. *See Citizens for Peace in Space*, 477 F.3d at 1224 ("[S]ecurity planning is necessarily concerned with managing potential risks, which sometimes necessitates consideration of the worst-case scenario.").

177. *E.g., Tabbaa*, 509 F.3d at 106 ("Given CBP's extensive expertise . . . we are unwilling to conclude . . . that fingerprinting and photographing were not actually necessary to ensure that suspected terrorists leaving the RIS Conference did not enter the United States.").

178. *See* Fiss, *supra* note 32, at 3 (discussing this dynamic in the context of immigration enforcement policy).

179. *See* Tversky & Kahneman, *supra* note 61, at 163-64; *see also, e.g.*, Tabbaa v. Chertoff, No. 05-CV-582S, 2005 U.S. Dist. LEXIS 38189, at *3 (W.D.N.Y. Dec. 21, 2005) (finding that the "unfortunate," "frustrating," "uncomfortable," and "aggravating" quality of the plaintiffs' individual experiences were outweighed by "the government's interest in securing the nation against the entry of unwanted persons and things"), *aff'd*, 509 F.3d 89; *cf. Tabbaa*, 509 F.3d at 105 ("We do not believe the extra hassle of being fingerprinted and photographed—for the sole purpose of having their identities verified—is a 'significant[]' additional burden that turns an otherwise constitutional policy into one that is unconstitutional."); *Citizens for Peace in Space*, 477 F.3d at 1224 ("[T]he City made a reasonable assumption that protestors could pose more of a security risk to the conference than other persons, an assumption that, for example, finds some support given the violent protests surrounding the World Trade Organization meeting in Seattle, Washington.").

180. *See* Fiss, *supra* note 32, at 3.

IV. TOWARD A COHERENT THEORY OF HYBRID SITUATIONS

The Supreme Court's elaboration of "hybrid situations" begins and ends with *Smith*. The decision gave little guidance on how to understand a hybrid situation, beyond defining it as a claim featuring the Free Exercise Clause "in conjunction with" another constitutional protection and offering illustrative examples from two lines of cases.[181] The Court cited *Yoder* as a situation where the Free Exercise Clause had reinforced the claim of a substantive due process "parental right" to direct the education of one's child, and cited *Cantwell* and several other cases involving Jehovah's Witnesses as instances where the Court had upheld religious claims that were paired with secular First Amendment "communicative activity."[182] Without any further instruction, the resulting debate about how to present and evaluate future hybrid situations has yielded sharply divergent academic critiques[183] and the absence of any precedential federal circuit court ruling that vindicates a hybrid claim as the sole basis of relief.[184]

A theory of hybrid situations should accomplish at least four things in order to be persuasive and pragmatic while respecting existing doctrine. First, it must take Justice Scalia's opinion in *Smith* at face value: a hybrid claim is an entity distinct from its free exercise and secular components, meriting a more solicitious reading of the pleadings than would result if either claim were pleaded alone. Second, it must limit the scope of hybrid situations so plaintiffs cannot trigger strict scrutiny simply by pleading causes of action under both the Free Exercise Clause and a companion provision. Otherwise, as Justice Souter has noted, "the hybrid exception would probably be so vast as to swallow the *Smith* rule . . . ."[185] Third, the theory must explain *why* hybrid claims could succeed where the Free Exercise Clause alone might fail. And

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181. *See* Employment Div. v. Smith, 494 U.S. 872, 881 & n.1 (1990).

182. *Id.* at 881-82.

183. *E.g.*, Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573 (2003); John L. Tuttle, Note, *Adding Color: An Argument for the Colorable Showing Approach to Hybrid Rights Claims Under* Employment Division v. Smith, 3 AVE MARIA L. REV. 741 (2005).

184. *See* William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998) (summarizing hybrid claims in lower courts); *cf.* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692 (9th Cir. 1999) (finding the state's fair housing statute to violate landlords' Free Exercise, Free Speech, and Fifth Amendment Takings Clause "hybrid right" to exclude unmarried couples from their property), *rev'd en banc on ripeness grounds*, 220 F.3d 1134 (9th Cir. 2000).

185. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring).

fourth, it must reflect the essential character of the free exercise precedents that *Smith* put in the "hybrid" box by identifying and narrowly incorporating the constitutional values at stake.

This Part seeks to provide a coherent theory of hybrid situations. It argues that courts must undertake strict scrutiny where plaintiffs demonstrate that indirect burdens on their religiously motivated exercises of secular constitutional rights may impose costs felt throughout their religious communities. Courts should read the pleading of religious motivation as reason to suspect that many of the plaintiff's coreligionists may also seek to exercise secular freedoms that are valuable to all Americans regardless of faith – and that their efforts will be similarly impaired. Factual development of the case record could rebut this inference of group harm, particularly where the plaintiff's actions are not representative of a wider community.

This emphasis on group harm, as opposed to religious virtue, grounds hybrid situations in minority vulnerability.[186] The religious assumptions of legislators and administrators may often influence how they regulate constitutional activity.[187] Hybrid claims would signal to courts that those regulations, despite their supposed neutrality, may have the unintentional effect of undermining crucial avenues for religious minorities to preserve and promote their interests through the exercise of constitutional rights. In this way, the proposed theory avoids making each believer "a law unto himself," because it recognizes hybrid claims only when especially vulnerable plaintiffs seek the realization of specific, narrow, and constitutionally privileged goals.

A. Prior Attempts at Understanding Hybrid Situations

The *Smith* Court chose to announce the concept of hybrid situations instead of invalidating *Yoder* altogether or confining it to its facts. Yet several federal courts of appeals have nonetheless concluded that free exercise concerns cannot reinforce other constitutional claims that are not already viable on their own. The Second and Sixth Circuits have held that *Smith*'s hybrid exception is

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186. *Cf.* Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) ("What properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value . . . .").

187. *See* Kenneth L. Karst, *Religious Freedom and Equal Citizenship: Reflections on* Lukumi, 69 TUL. L. REV. 335, 354-55 (1994); Yoshino, *supra* note 5, at 929 (noting that "to the extent that religions do not fit into mainstream conceptions of religion – such as Christianity – they are likely to remain unprotected").

dicta,[188] and the D.C. and First Circuits require the companion claim to be "independently viable," rendering the free exercise ingredient wholly unnecessary since the companion claim could win the case alone.[189] By dismissing hybrid situations as a nullity, these courts do not meet even the first of the four criteria discussed above.

In contrast, the Ninth and Tenth Circuits have met both the first and second criteria by finding that hybrid situations merit strict scrutiny if the companion claim is "colorable," in that it has "a fair probability or a likelihood, but not a certitude, of success on the merits."[190] This view recognizes that a plaintiff who pleads the existence of a hybrid situation is in a different position from one who merely pleads the individual companion claim. It also prevents religious plaintiffs from triggering strict scrutiny merely by mentioning free exercise rights in the same breath as another freedom.[191] This approach still falls short, however, by failing to address *why* hybrid claims should merit a more generous reading.

Several commentators have attempted to meet this third criterion. "Signaling theory" offers one possible explanation: "when facially neutral statutes infringe both a free exercise right and another substantive provision of the Constitution, the legitimacy of the act deservedly is cast into doubt."[192]

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188. Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003); Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993); *see also* Tuttle, *supra* note 183, at 746-47.

189. Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting a hybrid claim because the challenged regulation did not violate the Free Exercise Clause and the plaintiffs made "no viable [Speech Clause] claim," such that "in law as in mathematics zero plus zero equals zero"); Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (rejecting a hybrid claim where, among other things, the free exercise challenge was "not conjoined with an independently protected constitutional protection"); Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111, 121 (D.N.H. 2003) (reading First Circuit precedent as recognizing the hybrid exception "only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim"); *see also* Tuttle, *supra* note 183, at 754-56, 764.

190. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1032 (9th Cir. 2004) (quoting Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999)); *see also* Axson-Flynn v. Johnson, 356 F.3d 1277, 1295-97 (10th Cir. 2004) (also recognizing "colorable claim" theory); Tuttle, *supra* note 183, at 756-61.

191. *See* Timothy J. Santioli, *A Decade After* Employment Division v. Smith*: Examining How Courts Are Still Grappling with the Hybrid-Rights Exception to the Free Exercise Clause of the First Amendment*, 34 SUFFOLK U. L. REV. 649, 669-670 (2001).

192. Ming Hsu Chen, Note, *Two Wrongs Make a Right: Hybrid Claims of Discrimination*, 79 N.Y.U. L. REV 685, 692 n.38 (2004); *see also* Tuttle, *supra* note 183, at 768 ("[T]he religious objector should be expected to bear some burden upon his free exercise rights, but not bear that same burden in addition to others. The hybrid rights exception eliminates the straw that broke the camel's back.").

Hybrid situations would thus be interpreted as "send[ing] a message that a particular law is so flawed as to be of dubious constitutional value" because it burdens not one but two constitutional rights.[193] But even if that were the case, signaling theory does not satisfy the fourth criterion, because it ignores the fact that hybrid claims are *only* available under the Free Exercise Clause, and are not in fact cognizable whenever multiple constitutional provisions are implicated.

Another view, proposed by Ming Hsu Chen, is that hybrid claims should be understood as a form of intersectionality.[194] Intersectionality theory examines how society and law alike can marginalize the discrimination experienced by those who do not resemble the prototypical members of ascriptive categories such as "female" or "black," because they fit instead into multiple categories.[195] Chen argues that plaintiffs who are both religious and racial minorities—such as Arab-American Muslims—should be able to use the Free Exercise Clause to strengthen their primary claims under the Equal Protection Clause, because existing antidiscrimination discourse is insufficient to address "the unique social reality of dual minorities."[196]

Although this critique may be valid in certain contexts, it is ultimately unsatisfying as a universal theory of hybrid situations. This intersectionality approach incorrectly presumes that minority phenotype is a necessary precondition for religious subordination. As Chen concedes, the theory would not assist those who appear to be of European ancestry and who are raised as Muslims or convert to Islam.[197] Yet overinclusive conduct-based counterterrorism policies such as *Tabbaa*'s cultural profile can target Muslims solely on the basis of their religious identity performances, without regard for ethnicity.[198] And as shown by the experiences of the Amish and the Jehovah's

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193. Chen, *supra* note 192, at 692 n.38 (citing Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999-1000 (1990)); Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Provenance and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833, 861 (1993) ("[T]ying free exercise protections to other substantive protections gives minority-religion adherents a way to signal that the lawmaker has exceeded its legitimate authority in a particular enactment or act.").

194. *See* Chen, *supra* note 192.

195. *See* Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1991).

196. Chen, *supra* note 192, at 687.

197. *Id.* at 710.

198. Following the *Tabbaa* detentions, a "white Flushing resident said U.S. officials refused to tell her why she was being held for eight hours. 'It's just appalling,' said Jean Tassi, 53. 'If I didn't have on a head covering, I would have never been stopped.'" Casimir, *supra* note 70. Similarly, Imam Hamza Yusuf, the RIS Conference's keynote speaker and a white convert to

Witnesses, hybrid claimants need not be racial or ethnic minorities to be subordinated by society or to earn judicial solicitude. Nonetheless, Chen rightly intuits that a theory of hybridity should be premised upon protecting vulnerable religious communities. A closer review of *Yoder* and the Witness cases is necessary to help elaborate how this protection has been extended in the past, and how it should be extended in the future.

B. Grounding Hybrid Situations in Yoder *and the Jehovah's Witness Cases*

The common thread running through *Yoder* and the 1940s Jehovah's Witness cases was the Supreme Court's willingness to help members of a discrete religious community who sought to combat the subordination of their community's distinctive interests. *Smith*'s compartmentalization of these precedents into a single category labeled "hybrids" creates a narrow but defined space in which judges can effect a limited revival of this vigilance against group harms.

Just before *Yoder*, the Court issued two conscientious objector decisions that articulated a broad statutory interpretation of religion as the spiritual dimension of individual conscience, unattached to any particular affiliative community.[199] *Yoder* itself, however, embraced a strongly group-protective view of religiously motivated action, emphasizing that "religion" as protected by the Free Exercise Clause is not just a question of individual belief and practice but also of the construction and expression of community identity. In *Yoder*, three Amish fathers challenged their convictions for keeping their children home after the eighth grade in violation of Wisconsin's compulsory school attendance law. Because living "aloof from the world and its values" was central both to their religious faith and their "entire mode of life,"[200] the fathers felt that their children would be corrupted by the worldly influences they would encounter in secondary school.[201] While the Court did not dwell on the respondents' concerns for their eternal souls, it did show great concern for whether the Wisconsin law would undermine propagation of the Amish way of

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Islam, was detained and interrogated for three hours as he returned home. *See* Hoffman, *supra* note 82.

199. *See* Welsh v. United States, 398 U.S. 333, 340 (1970); United States v. Seeger, 380 U.S. 163, 166 (1965); Steven D. Collier, Comment, *Beyond* Seeger/Welsh*: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 984 (1982).

200. Wisconsin v. Yoder, 406 U.S. 205, 210, 219 (1972).

201. *Id.* at 209, 211.

life by disrupting "the integration of the Amish child into the Amish religious community."[202]

Notably, the Court believed that both "the Amish community *and* religious practice" were at stake, analyzing Amish group identity as a distinct but equal factor alongside their spiritual orientation.[203] Recognizing that the Wisconsin law imposed significant costs upon that identity, the Court took aim not only at the law's specific burdens upon the parties to the litigation, but also at how it jeopardized "the continued survival" of the Amish community as a whole.[204] By frequently citing expert testimony that compulsory high school attendance would destroy that religious community "as it exists . . . today,"[205] the Court drove home the value of that group's ability to define itself on its own terms.[206] Because the law could have had a cumulatively destructive effect upon the Amish community's cohesion, the Court endorsed the fathers' invocation of their constitutional rights as a way to define and preserve that religious identity in the face of ever-increasing expansion of government regulation into their daily lives.[207]

The Court's great respect for the Amish may partly explain the *Yoder* majority's solicitude,[208] but the Amish were not the first religious community for whose social identity the Court demonstrated considerable concern. Rather, the Court's efforts to curb religious subordination began in earnest during the Second World War on behalf of a less likely beneficiary: Jehovah's Witnesses. At the time, Jehovah's Witnesses were a highly visible religious minority whose poor public image, owing to a confrontational style of proselytization, became even worse as a result of wartime hysteria.

In 1938, Witnesses Newton Cantwell and his sons Jesse and Russell were arrested for proselytizing in New Haven, Connecticut. They were convicted of common law breach of the peace and for soliciting religious donations without a license, in violation of a law giving state officials wide latitude to certify legitimate religious causes. The Cantwells challenged their convictions as unconstitutional under the Free Speech Clause and the Free Exercise Clause, but the state supreme court affirmed all three statutory convictions and Jesse

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202. *Id.* at 211-12.

203. *Id.* at 218 (emphasis added); *see also id.* at 235 (considering "the continued survival of Old Order Amish communities *and* their religious organization" (emphasis added)).

204. *Id.* at 209.

205. *Id.* at 212.

206. *See id.* at 209, 212, 218.

207. *See id.* at 217.

208. *See id.* at 222.

Cantwell's conviction for breach of the peace. A unanimous Supreme Court reversed in *Cantwell v. Connecticut*.[209] The Court invalidated the licensing law under the First Amendment because it empowered the state to censor a religion as a "means of determining *its right to survive*."[210] The Court also reversed Jesse Cantwell's common law conviction, finding that while his public performances of a "highly offen[sive]" anti-Catholic phonograph "not unnaturally aroused animosity" in passersby, the "shield" of First Amendment liberties is nowhere "more necessary than in our own country for a people composed of many races and of many creeds."[211]

Viewed with post-*Smith* hindsight, the Free Exercise Clause may not have been essential to invoke constitutional protection for the Cantwells' religiously motivated activity. As some have argued, the Free Exercise Clause may be partially "redundant" in light of today's expansive view of the Free Speech Clause.[212] It is conceivable that even in 1940, the Court could have decided the case squarely on secular First Amendment grounds. Yet the prominent presence of the Free Exercise Clause in the pleadings did what the Free Speech Clause alone could not: underscore the distinctive religious function of the Cantwells' conduct. While protection for their communicative acts may have been justifiable under a Kantian theory of respecting personal autonomy or a Meiklejohnian desire to promote inputs into the audience's democratic deliberation,[213] the Cantwells' speech was also meaningful as a public expression of membership in a cohesive community—one whose distinctively provocative modes of propagation and civic participation would otherwise be curtailed by the polity's opinion of what constituted worthwhile identity performances.

The Court's note about how the Cantwells' activities related to the "survival" of their religion hinted at what *Yoder* later made explicit: that courts should be particularly sensitive to religious minorities' use of constitutional rights to protect the interests and existence of their discrete community.[214] Unlike in *Reynolds* or *Smith*, the religious expression in *Cantwell* involved members of a religious minority seeking to express their own social culture through their outwardly directed civic identity as Americans. The Court properly avoided penalizing the Cantwells' religiously motivated civic

209. 310 U.S. 296 (1940).

210. *Id.* at 305 (emphasis added).

211. *Id.* at 309-11.

212. Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 73 (2001).

213. *See supra* Section III.B.

214. *Cantwell*, 310 U.S. at 310-11.

performativity, not because their religious motivations made their message more valuable, but because its value to their discrete social community would likely go unregarded and unprotected by majoritarian politics.[215]

Following *Cantwell*, the Court heard many more challenges to restrictions on Jehovah's Witnesses' fervently aggressive proselytizing.[216] In many of these cases, the Court's stated reasons "for striking down the [various speech-restrictive] statutes did not depend upon religious motivation."[217] But the Court was well aware "that the cases were parts of a piece, involving the same group that was . . . constantly in conflict with much of the rest of society."[218] This awareness that the Witnesses' exercise of secular constitutional rights was motivated by their membership in a distinctive religious community may have shaped how the Justices chose to vindicate the rights at stake.

In particular, *West Virginia State Board of Education v. Barnette* demonstrated the Court's willingness to intervene where a government institution—the Court itself—had stigmatized a religious community's exercise of secular constitutional rights as disloyal and ratified existing animus toward its members.[219] By the late 1930s, Witness schoolchildren and adults had begun refusing to salute the American flag as a political protest and rejection of idolatry.[220] Their refusal to salute was viewed as a sign of "sympathy and even collaboration with the Nazi regime."[221] When the Court's 1940 decision in *Minersville School District v. Gobitis* rejected a Witness challenge to a Pennsylvania law compelling public schoolchildren to salute,[222] it helped to spark a wave of law enforcement-assisted anti-Witness lynching and mob violence.[223]

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215. *See also* Yang, *supra* note 3, at 138 & n.93 ("[T]he aspects of religion that would specifically suffer harm from government actions if the Religion Clauses did not exist would be the identity and value-framework aspects.").

216. *See* William Shepard McAninch, *A Catalyst for the Evolution of Constitutional Law: Jehovah's Witnesses in the Supreme Court*, 55 U. CIN. L. REV. 997 (1987); James R. Mason, III, Comment, Smith*'s Free-Exercise "Hybrids" Rooted in Non-Free-Exercise Soil*, 6 REGENT U. L. REV. 201, 230-32 (1995) (discussing cases).

217. Mason, *supra* note 216, at 231.

218. McAninch, *supra* note 216, at 1000.

219. 319 U.S. 624 (1943).

220. Blasi & Shiffrin, *supra* note 12, at 438-39.

221. *Id.* at 442.

222. 310 U.S. 586 (1940).

223. As one sheriff responded when asked why seven Jehovah's Witnesses were being run out of town, "They're traitors—the Supreme Court says so. Ain't you heard?" Blasi & Shiffrin, *supra* note 12, at 445 (internal quotation marks omitted).

Three years later, the Supreme Court overturned *Gobitis* in *Barnette*, holding that because a West Virginia flag salute law touched deeply on "matters of opinion and political attitude," the state lacked the power to compel *any* student's pledge.[224] The Court decided the case solely on individualistic Free Speech Clause grounds, but religion was clearly at the controversy's core,[225] as *Smith* recognized half a century later.[226] Justice Jackson, *Barnette*'s author, eventually removed his initial references to the national anti-Witness violence from his earlier draft in order to avoid suggesting that the Court was bowing purely to "political or humanitarian" sentiments.[227] The published opinion's perspective on the individual rights at issue, however, remained shaped by an awareness of how government action had indirectly stigmatized and subordinated an especially vulnerable religious minority's exercise of those freedoms.[228]

C. *Essential Elements of a Hybrid Situation*

In the face of neutral policies of general application, *Smith* renders the Free Exercise Clause useless as protection for individual action. And even in the hybrid situations of *Cantwell* and *Yoder*, the activities at issue—speaking on a street corner or educating one's child—could be characterized by the companion right alone. Nonetheless, the Free Exercise Clause helped illustrate those hybrid claimants' motives and allegations of harm: because they were members of minority religious communities, not only had society undervalued their distinctive exercise of constitutional rights, but this indifference threatened to significantly burden many more people beyond the plaintiffs.

Thus *Cantwell* and *Yoder* can both be viewed as consisting of two complementary elements. First, the claims involved religiously motivated exercises of secular companion rights. Even if other constitutional rights might also be viable in future hybrid claims, freedom of speech and the right of

224. 319 U.S. at 636.

225. *See id.* at 634 ("[R]eligion supplies appellees' motive for enduring the discomforts of making the issue in this case . . . .").

226. *See* Employment Div. v. Smith, 494 U.S. 872, 882 (1990) (citing *Barnette* while discussing hybrid claims); Blasi & Shiffrin, *supra* note 12, at 448.

227. Blasi & Shiffrin, *supra* note 12, at 451.

228. *See Barnette*, 319 U.S. at 630 ("Children of this faith have been expelled from school and are threatened with exclusion for no other cause [than their religiously motivated refusal to salute the flag]. Officials threaten to send them to reformatories maintained for criminally inclined juveniles. Parents of such children have been prosecuted and are threatened with prosecutions for causing delinquency.").

parental control represent core tools for protecting one's religious community. Propagation of one's culture through one's children is a precondition to almost all other means of preserving religious identity,[229] and participation in civic dialogue is the only way that religious minorities with minimal government representation can make themselves heard in order to advance their interests and win support from others. Second, as discussed above, *Cantwell* and *Yoder* were not decided solely in light of the individual plaintiffs' personal dignitary or economic interests. Rather, the Court considered how the burdens upon their exercises of secular rights would have repercussions throughout their religious communities. These two elements, religious motivation and group harm, should be viewed as essential preconditions for all future hybrid situations.

The "motivation" element is absent where claims are merely predicated upon religious objections to compliance with regulations governing the exercise of secular rights. Consider a person who refuses to submit, on anti-idolatry grounds, to an ordinance requiring that he be photographed in order to register for a gun license, and who then challenges that ordinance in court by pleading a hybrid claim under the Free Exercise Clause and Second Amendment.[230] Even if the right to keep and bear arms were recognized as an individual right, his complaint would not present a hybrid situation under the proposed theory.[231] Had the plaintiff alleged that his religion also motivated his desire to possess firearms, it would have properly signaled to the court that one group of Americans may be uniquely burdened in their attempts to exercise the rights that all Americans enjoy. But by claiming only that his faith motivates his refusal to acquiesce to incidental administrative procedures, the plaintiff gives the court no reason to suspect that religious minorities are being systematically thwarted as they attempt to engage in secular constitutional activity.

Even where the pleading of religious motivation creates an inference of group harm, that inference might not be sustained on the facts presented. Accordingly, the absence of the "group harm" element would preclude a court's recognition of a hybrid situation and its application of strict scrutiny. For example, an American Jew may teach others about the Kabbalah by giving tarot

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229. *See* Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) ("[T]he values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society.").

230. *See* Green v. City of Philadelphia, No. 03-1476, 2004 U.S. Dist. LEXIS 9687 (E.D. Pa. May 26, 2004).

231. *Cf. id.* at *22-25 (rejecting the existence of a hybrid claim because there was no colorable companion claim).

card readings in the town park, inspired to do so by his decade-long study in Israel of the "mystical side of the Torah."[232] He might challenge the constitutionality of a local law regulating public vendors by pleading a hybrid free exercise/freedom of speech claim, arguing that reading tarot "is the manner in which he has chosen to express his beliefs and to convey a message" to those who offered him donations for his readings.[233] Yet because of the idiosyncratic nature of his religious expression, it would be unlikely that he could substantiate a claim that upholding the law's validity would significantly burden a community of believers.

A third element is also needed to define hybrid situations that implicate the Free Speech Clause, in order to explain why the use of peyote in *Smith* did not present a hybrid situation. The *Smith* plaintiffs had ingested the drug as a sacrament during a Native American Church ceremony, making the act arguably symbolic conduct.[234] The Court nonetheless reasoned that such conduct was "unconnected with any communicative activity" that would constitute a hybrid situation.[235] By refusing to consider devotional self-expression as "communication," the Court implicitly rejected the Kantian theory of the First Amendment in this context. However, *Smith* could be read consistently with the Meiklejohnian view of the Free Speech Clause as encouraging civic deliberation. In contrast, symbolic rites are often performed in private and their primary meaning is only intended for or intelligible to one's own deity or religious community. Viewed as purely intragroup devotional discourse, the ceremonial use of peyote failed to interact with established secular constitutional values as required to state a hybrid claim. Accordingly, a future hybrid claim featuring freedom of speech or association would have to more directly implicate the religious actor's role in the wider civic culture's marketplace of ideas.

D. "Hybridity" Versus "Antisubordination"

By employing the Free Exercise Clause as a signifier of membership in a distinct religious minority, hybrid claims echo the concern for group status that

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232. *See* Krafchow v. Town of Woodstock, 62 F. Supp. 2d 698, 700, 712-13 (N.D.N.Y. 1999) (holding that a content-based regulation of speech in a public forum violated the tarot-reading plaintiff's rights under the Free Speech Clause, but finding that his hybrid free exercise claim failed for reasons not involving the theory of hybrid claims discussed above).

233. *See id.* at 712.

234. *See* Salmons, *supra* note 8, at 1256-57; Tushnet, *supra* note 212, at 75-77.

235. *See* Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

long has characterized "antisubordination" theories of the Fourteenth Amendment.[236] As articulated by Owen Fiss, antisubordination's interpretive gloss on the Equal Protection Clause argues for restraining government action that aggravates the social or civic status "of a specially disadvantaged group."[237] Since *Washington v. Davis*,[238] however, the Supreme Court has largely opted for a different interpretation.[239] Free exercise hybridity might thus be criticized as an effort to reintroduce the antisubordination principle under the guise of religious freedom doctrine. While the proposed theory of hybrid situations certainly does share antisubordination's attention to the societal position of vulnerable minority groups, hybridity's solicitude for religious identity is based on distinct – and perhaps stronger – textual and doctrinal foundations.

While the words of the Free Exercise Clause presuppose the existence and value of groups, the Equal Protection Clause aspires to ignore them. The Equal Protection Clause speaks only of "any person" and says nothing of race, giving ample ammunition to those who argue that the only way to achieve a "color-blind" society is to end legal recognition for racial categories and instead interpret the Constitution's nondiscrimination command as a pure anticlassification principle.[240] In contrast, the First Amendment's explicit protection for religious expression demonstrates that religious difference was a form of "cultural diversity" that even the Founders, despite their ethnic homogeneity, chose to celebrate and promote.[241]

Further, the language of group harm fits uneasily into equal protection's *Davis/Feeney* anticlassification paradigm. Even though the Supreme Court has occasionally relaxed the burden of proof that racial minorities must meet when alleging a disparate impact upon their exercise of fundamental political rights,[242] no clear doctrinal hook exists upon which a judge could hang such an

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236. *See* Balkin & Siegel, *supra* note 30, at 9-10.

237. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976). By virtue of its attention to "group-disadvantaging" practices and hierarchies, *id.*, antisubordination theory is often cited in support of group-based ameliorative policies such as affirmative action. *See* Balkin & Siegel, *supra* note 30, at 11.

238. 426 U.S. 229 (1976).

239. *See supra* Section III.A.

240. *E.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 127 S. Ct. 2738, 2768 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

241. *See* Ira C. Lupu, *Keeping the Faith: Religion, Equality and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 742-43 (1986); McConnell, *supra* note 111, at 1421-30; Yang, *supra* note 3, at 136-37.

242. *See* Siegel, *supra* note 115, at 1138-39.

antisubordination approach to equal protection. In contrast, *Smith*'s exception for "hybrid situations" and the proposed readings of *Yoder* and the Jehovah's Witness cases open the door for courts to entertain certain claims of community injury without unsettling the rest of free exercise jurisprudence.

CONCLUSION

The hybrid nature of religious minority identity in this country consists of the struggle for dual acceptance: to be accepted both as an American and as a member of one's own social culture.[243] To keep the government from unnecessarily penalizing religious minorities who exercise constitutional rights in ways that the majority views skeptically, courts should look more expansively at the subordinating externalities involved and whether these costs could and should be mitigated through different administrative decisions. A theory of hybrid situations that encourages solicitude for religious groups would not only be true to the premises of *Cantwell* and *Yoder*, but would revive the original intuition behind the Free Exercise Clause as a protection for individuals in their capacity as members of minority religious communities.

American Muslims are likely to face continued skepticism from both state and private actors. The proposed theory of hybrid claims could help Muslim plaintiffs make stronger normative counterarguments to newer forms of counterterrorism profiling, in favor of more precise—albeit more resource-intensive—law enforcement tools. For example, if the Second Circuit had not already dismissed *Smith*'s discussion of hybrid situations as mere dicta, the *Tabbaa* plaintiffs could have made a hybrid claim. They might have asked the court to consider not only the individual harms caused by their detentions,[244] but also the broader stigmatic effects wrought by a profile that targeted their religiously motivated acts of association, yet correlated reliably with little else except being Muslim. After the *Tabbaa* detentions, DHS's spokesperson commented, "[i]t's unfortunate when people are delayed because we are going through additional security measures. But I think the American public expects us to carry out this mission and to do what's necessary. I think they want us to protect them."[245] Left unspoken is the fact that many among "the American

243. *See* Karst, *supra* note 4, at 328 ("The cultural outsider wants the freedom to shape his or her own identity, to be allowed to keep a 'primordial' identity and also to be accepted as one who belongs to the larger society.").

244. Tabbaa v. Chertoff, 509 F.3d 89, 98 (2d Cir. 2007) (acknowledging the plaintiffs' subjective perceptions of stigma and fear resulting from "the combined effect of the various measures employed").

245. Hoffman, *supra* note 82.

public" can afford to leave unexamined the question of "what's necessary," because they will rarely, if ever, bear the full dignitary or stigmatic costs of the policies enacted to protect them.[246]

When courts evaluate national security measures designed to protect the many at the expense of the few, they should explicitly consider how our efforts to protect "the American way of life" might instead become self-inflicted wounds to the ideals that define us. If American Muslims are to have any choice about how to remain both American *and* Muslim, and if America's civic values are to retain their luster, the national community should be willing to grapple creatively with how to combat genuine threats without branding a single segment of society as presumptively disloyal. Working out this balance may require better intelligence gathering and stricter scrutiny of government claims. And indeed, it may require thoughtful conversations about when the needs of the many must truly take precedence over the needs of the few. At the very least, the debate should not be shaped by policymakers' indifference to burdens that can keep one group of citizens from expressing their identities on equal terms with the rest of the American community.

246. *Cf.* United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) ("The search of carry-on baggage, *applied to everyone*, involves not the slightest stigma. More than a million Americans subject themselves to it daily . . . ." (emphasis added) (citation omitted)).